Office - Supreme Court, U.S.
FILED
JUN 4 1984
ALEXANDER L. STEVAS,
CLERK

83-1978

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM M. CORRIGAN,
Petitioner,

vs.

MARY SUSAN GOODWIN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

GODFREY P. PADBERG*
MICHAEL J. COLEMAN
1015 Locust Street
Suite 800
St. Louis, MO 63101
(314) 621-3787
Attorneys for Petitioner
**Counsel of Record*

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

Supp

QUESTIONS PRESENTED

1. Whether a State Judge of general jurisdiction is immune from suit for damages under 42 U.S.C. § 1983 when he transfers a female attorney from a temporary position of Administrative Hearing Officer to the Permanent position of Legal Advisor, said action being a judicial act as defined by the Missouri Supreme Court.

2. Whether sufficient evidence was presented at trial to sustain the damage verdict for sexual discrimination under 42 U.S.C. § 1983.[1]

---

[1] Other parties to this suit, also defendants in the original action, are the St. Louis County Circuit Court En Banc and St. Louis County. The United States Court of Appeals for the Eighth Circuit, in the Opinion attached in the Appendix to this Petition, retain jurisdiction over those appeals, while remanding them to the District Court for further findings. Counsel for St. Louis County has informed Petitioner that it will petition this Court for certiorari in the event that the Eighth Circuit concludes that it is jointly liable in this case. Counsel for the St. Louis County Circuit Court En Banc has informed Petitioner that it will join Petitioner in this action if the Eighth Circuit concludes that it is jointly liable and if the Writ prayed for herein is granted.

TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	1
Statement Of The Case	2
Reasons for Granting The Writ	4
I. The Decision Of The Court Of Appeals Conflicts With All Relevant Decisions Of This Court, Particularly *Stump v. Sparkman,* In That It Abrogates All Immunity, Absolute Or Qualified, Of A State Court Judge Of General Jurisdiction, Acting Within His Jurisdiction As Defined By The Missouri Supreme Court.	4
II. The Quantum Of Evidence Held Sufficient By The Court Of Appeals To Sustain A Punitive Damage Verdict Against A State Court Judge Of General Jurisdiction Under 42 U.S.C. 1983 Calls For The Exercise Of The Supervisory Powers Of This Court.	8
Conclusion	11
Appendix:	
A. Goodwin v. The Circuit Court of St. Louis County and William M. Corrigan, 729 F.2d 541 (8th Cir. 1984)	A-1
B. Goodwin v. The Circuit Court of St. Louis County and William M. Corrigan, 555 F.Supp. 658 (E.D.Mo.1982)	A-22

C. Statutes

42 U.S.C. § 1983 ..... A-32

42 U.S.C. § 1988 ..... A-32

R.S.Mo. 478.220 (1979) A-33

CITATIONS

Cases:

Bradley v. Fisher, 13 Wall. 335 (1872) 4

Butz v. Economou, 438 U.S. 478 (1978) 6

Flores v. Pierce, 617 F.2d 1386 (9th Cir.) Cert. Denied 449 U.S. 875 (1980 8

Gregorie v. Biddle, 177 F.2d 579 (2nd Cir. 1949) 8

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 6,7

Lovelace v. Sherwin-Williams Co., 681 F.2d 230 (4th Cir. 1982) 10

McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976) 9

Pierson v. Ray, 386 U.S. 547 (1967) 5,6

Pogue v. Swink, 284 S.W.2d 868 (Mo.Banc 1955) 5

Sherrill v. Wilson, 653 S.W.2d 661 (Mo.Banc 1983) 5

Stump v. Sparkman, 435 U.S. 349 (1978) 4,5,6

Tenney v. Brandhove, 341 U.S. 367 (1951) 6

Statutes:

42 U.S.C. § 1983 3,4,5,6

42 U.S.C. § 1988 3

R.S.Mo. 478.220 (1979) 5

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM M. CORRIGAN,
Petitioner,

vs.

MARY SUSAN GOODWIN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner William M. Corrigan Respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on March 6th, 1984.

OPINION BELOW

The Opinion of the Court of appeals is reported at 729 F.2d 541. The Opinion of the District Court relevant to the issues presented by this Petition For Certiorari appears at 555 F.Supp. 658.

JURISDICTION

The Judgment of the Court of Appeals for the Eighth Circuit was entered on March 6th, 1984. This Petition For Certiorari

was filed within ninety days of that date. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

In 1979, Judge William Corrigan, Petitioner herein, was asked by several other Circuit Judges in the Twenty-Second Judicial Circuit, State of Missouri, to assume the position of Presiding Judge of the Juvenile Court in order to restore public confidence, which had been shaken by adverse publicity, in that branch of the Court. At the time Petitioner accepted the position of Presiding Judge, the Juvenile Court employed three attorneys as hearing officers. The function of a hearing officer was to make initial findings of fact and conclusions of law which were then presented to the Presiding Judge for his review. On the basis of the information provided by the hearing officer, the Presiding Judge would make his ruling.

After an examination of the cases pending in court, Petitioner decided that the case load was insufficient to support the position of hearing officer, and that he and his commissioners could hear all the cases. Petitioner decided to eliminate two hearing officers immediately and the third when pending legislation was enacted removing traffic offenses from juvenile court jurisdiction. A male hearing officer volunteered for a position in the legal department. Petitioner then consulted with other supervisory personnel of the Juvenile Court with regard to whether Respondent or Craig Donis should be transferred to the permanent legal staff. Petitioner decided to transfer Respondent to the permanent legal staff and leave Donis to hear traffic cases, pending legislative action abolishing that function of the court. Seven months later, the Missouri legislature enacted legislation removing traffic cases from the Juvenile Courts and Mr. Donis was terminated. The pay and fringe benefits of a hearing officer and a legal staff member were the same.

Respondent filed suit in the United States District Court, Eastern District of Missouri, Eastern Division, Judge Clyde S.

Cahill Presiding, alleging that Petitioner's actions in transferring her to the legal staff were sexually discriminatory in violation of Title 42 United States Code § 1983. Respondent presented evidence that, three days before making his decision about whom to transfer to the permanent legal staff, Judge Corrigan stepped into the office of Commissioner Branom at the Juvenile Court and reportedly said, "This Court will never run well so long as there are women in charge." Commissioner Branom testified at trial that this remark was made in jest, and that it referred to a Corrine Richardson, the then Director of the legal department. Respondent further produced evidence that, after the filing of this action, at a meeting of the court en banc called to discuss the defense of the court, Judge Corrigan remarked to the Judge who had originally hired Respondent that this litigation was all his fault because he "had taken her out of the kitchen, taken her apron off, and put a robe on her." Some testimony indicated this was said in jest, other testimony indicated uncertainty as to the intent of this remark.

The trial court refused to grant Judge Corrigan immunity, either absolutely or qualifiedly, and refused to submit a good faith instruction to the jury. The jury awarded Respondent nominal damages of $1.00 and punitive damages of $1,000.00. The trial court awarded Respondent $17,972.29 in attorneys' fees and costs under 42 U.S.C. § 1988.

A three Judge panel of the United States Court of Appeals for the Eighth Circuit, Judge Bowman dissenting, affirmed the District Court's action in sustaining the jury verdict and awarding attorneys' fees. The Eighth Circuit held that Respondent presented sufficient evidence for the jury to determine that Petitioner's conduct was either motivated by evil motive or intent or was recklessly or callously indifferent to Respondent's rights. The Eighth Circuit further held that qualified immunity and a good faith defense were not available in this case and that absolute immunity was unavailable because Petitioner's acts were not within his official judicial capacity.

REASONS FOR GRANTING THE WRIT

This case presents important questions concerning the liability for damages of State Court Judges of general jurisdiction under 42 U.S.C. § 1983. The Court of Appeals found that the transfer of Respondent from the position of Administrative Hearing Officer to a position on the permanent legal staff was not a judicial act and, therefore, no immunity from suit for damages was available. The holding of the Court of Appeals both misreads this Court's pronouncements on judicial immunity and seriously impairs the free and unfettered functioning of State Court Judges. This holding chips awary at the scope of judicial immunity and exposes State Court Judges to a dual standard for immunity. A Judge whose acts are within his jurisdiction under the law of his State may find himself exposed to liability for damages under a substantially narrowed federal definition of jurisdiction. This decision not only recreates the exact problem which judicial immunity was created to solve, but so deviates from this Court's thinking in *Stump v. Sparkman,* 435 U.S. 349 (1978) that review of the decision below is essential.

I

The Decision Of The Court Of Appeals Conflicts With All Relevant Decisions Of This Court, Particularly Stump v. Sparkman, In That It Abrogates All Immunity, Absolute Or Qualified, Of A State Court Judge Of General Jurisdiction, Acting Within His Jurisdiction As Defined By The Missouri Supreme Court.

In 1872, this Court first examined fully the common law doctrine of judicial immunity in *Bradley v. Fisher,* 13 Wall. 335 (1872). The Court recognized that it was "a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him [should] be free to act upon his own convictions, without apprehension of personal consequence to himself. Liability to

answer to everyone who might feel himself agrieved by the actions of the Judge, would be inconsistent with the possession of this freedom, and would destroy the independence without which no judiciary can be either respectable or useful" 13 Wall at 347. This immunity exists even when a Judge acts in excess of his jurisdiction and the act is alleged to have been done maliciously or corruptly, *Stump v. Sparkman, supra* at 355. In *Pierson v. Ray,* 386 U.S. 547 (1967), this Court held that the doctrine of judicial immunity was applicable to suits brought under Subsection 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983 because the legislative record failed to indicate any intent to abolish this established common law principle.

This Court's decision in *Stump v. Sparkman, supra,* began the process of defining the breath of judicial immunity. *Stump,* at 360, recognized that "[t]his court has not had occasion to consider, for purposes of the judicial immunity doctrine, the necessary attributes of a judicial act... ." This Court found that the jurisdiction of a State Court Judge should be determined by looking to the law of the State. Missouri law as to the jurisdiction of its judges is well settled. By statute, "Circuit Judges may hear and determine all cases and matters within the jurisdiction of their courts..." R.S.Mo. 478.220 (1979). The definition of the word "matters," as relevant to this writ, was decided by the Missouri Supreme Court en banc in *Pogue v. Swink,* 284 S.W. 2d 868 (Mo. Banc 1955). The Missouri Supreme Court held that "[E]ven in the absence of specific statutes on the subject, courts of general jurisdiction have the inherent power to do all things reasonably necessary to preserve their existence and function as a Court and have the power to appoint necessary attendants, including clerks and janitors," *Pogue, supra* at 872. The Court in *Pogue* found that salary and tenure decisions related to employees of the Court require the exercise of judicial discretion and were acts within the Court's jurisdiction to which judicial immunity applied. *Pogue* has noted as authority by the Missouri Supreme Court en banc as recently as June of 1983 in *Sherrill v. Wilson,* 653 S.W. 2d 661, 665 (Mo. Banc. 1983).

In *Stump v. Sparkman,* this court was faced with a situation where neither the legislature nor the courts of Indiana had spoken directly to the issue of Judge Stump's jurisdiction over sterilization petitions. This Court found that "in our view, it is more significant that there was no Indiana statute and no case law in 1971 prohibiting a Circuit Judge, a Court of general jurisdiction, from considering a Petition of the type presented to Judge Stump," *Stump, supra* at 358. In the instant action, no such void exists. The Missouri Supreme Court en banc has clearly held that employment decisions relating to Court employees are within the jurisdiction of Circuit Judges for purposes of judicial immunity. The Court of Appeals ignored both the directives of this Court and Missouri law and, in a footnote, 729 F 2d 549 n.12 (8th Cir. 1984), dismissed petitioner's claim for judicial immunity. In doing so, the Court of Appeals places State Court Judges in the position of having no reasonable guidelines as to the scope of their jurisdiction. They can clearly no longer rely on their State Supreme Court for guidance. "Imposing such a burden on judges [contributes] not to principle and fearless decisionmaking but to intimidation," *Pierson v. Ray,* 386 U.S. at 554. This Court should grant Petitioner's Writ in order to define the necessary attributes of a judicial act for purposes of the judicial immunity doctrine.

Petitioner argued to both the trial court and the Court of Appeals that if he were not entitled to absolute judicial immunity, he should be entitled to a qualified, good faith, immunity. This Court has examined immunity from damage liability under 42 U.S.C. § 1983 for members of all three brances of government, *Tenney v. Brandhove,* 341 U.S. 367 (1951), *Butz v. Economou,* 438 U.S. 478 (1978), and has found some form of immunity in all cases involving performance of official discretionary acts. Even if the acts of Petitioner are viewed as non-judicial, and thus outside the scope of absolute immunity, they were undisputably official discretionary acts, and Petitioner should be entitled to at least qualified immunity. In *Harlow v. Fitzgerald,* 457 U.S. 800, 813 (1982) this Court recognized that when of-

ficial functions do not rise to the level of absolute immunity "public policy at least mandates an application of the qualified immunity standard...." In the instant action, Respondent was responsible for hearing cases and preparing Findings of Fact and Conclusions of Law for Petitioner's signature. Surely public policy would favor a Judge's freedom to select, without intimidation, the person to perform this task, rather than favoring a right to damages of a female employee who was transferred to the only permanent position available, while her male counterpart was terminated from employment.

The Court of Appeals reads *Harlow* in such a way as to completely do away with qualified immunity. It reasons that if the jury finds liability, good faith could not have existed and therefore qualified immunity does not apply. This reasoning puts the cart before the horse. The purpose of immunity is to prevent litigation against public officials in performance of their official discretionary acts. A test of applicablity of immunity which relies on the jury verdict as a determining factor destroys the entire doctrine. All cases will have to be tried and defended before a determination of the immunity question can be made. If the jury finds for claimant, ipso facto, no good faith defense exists and if the jury finds for defendant, a good faith defense was not necessary. The Court of Appeals Opinion allows the jury to detemine both the sufficiency of the evidence and whether a good faith defense is appropriate. Both are questions of law and not within the province of the jury. The Opinion below further contradicts the very purpose of immunity. "The justification for [immunity] is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of trial and to the inevitable danger of its outcome, would dampen the ardors of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. * * * The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers; and it can be argued that

official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him...," *Gregoire v. Biddle,* 177 F. 2d 579, 581 (2nd Cir. 1949) (Learned Hand, J.). In support of its position, the Court of Appeals relies on *Flores v. Pierce,* 617 F. 2d 1386 (9th Cir.) cert. denied 449 U.S. 875 (1980). *Flores* is a case where city officials attempted to prevent two Mexican Americans from obtaining a liquor license because of their national origin. Petitioner submits that *Flores* is so different, both in fact and in policy, that it is not dispositive of Petitioner's immunity.

While Petitioner submits that his acts were judicial in character and thus protected by absolute immunity, if this Court believes that Petitioner's acts were non-judicial, this Writ should still be granted to examine the immunity of State Court Judges when they perform official, discretionary acts which do not relate directly to specific cases.

II

The Quantum Of Evidence Held Sufficient By The Court Of Appeals To Sustain A Punitive Damage Verdict Against A State Court Judge Of General Jurisdiction Under 42 U.S.C. 1983 Calls For The Exercise Of The Supervisory Powers Of This Court.

Respondent presented two items of evidence to show Petitioner's bias against women. That evidence, however, failed to make a submissible case of sex discrimination because it totally failed to show causality.

Taken in the light most favorable to Respondent, the evidence establishes nothing more than an inference that Petitioner wished to rid the Juvenile Court of women. Petitioner's actions were, however, contrary to that inference. He appointed Respondent to a position on the permanent legal staff and left Mr. Donis in the soon to be terminated position of hearing officer. Had Petitioner left Respondent in the position of hearing officer and appointed Mr. Donis to the permanent position, the inference created by his remarks may have been sufficient for Respondent to have made a submissible case, but that is not what occurred. The uncontested actions of Petitioner clearly show that, as to this Respondent in this case, Petitioner was not discriminating on the basis of sex.

This Court has always recognized that a discrimination case requires proof of a causal relationship between the Petitioner's race or sex and the employment decision in question. In *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 282 n.10 (1976), a Title VII case, this Court recognized the required showing of a 'but for' connection between the alleged discrimination and the employment decision. The only 'but for' causal relationship that can be drawn from Respondent's evidence is that: Respondent would not have been transferred to a permanent position while her male counterpart was terminated, but for Petitioner's bias against women.

The evidence of sex discrimination presented at trial by Respondent consisted of two remarks made by Petitioner. The first remark, made three days prior to transferring Respondent to a permanent position, was recalled slightly differently by each of Respondent's witnesses. Each, however, agreed as to the general content: "This Court will never run well so long as there are women in charge." The evidence was uncontested that this remark referred to Corrine Richardson rather than Respondent and that Petitioner had a big smile on his face and a twinkle in his eye when the remark was made.

The second item of evidence of sex discrimination was a remark made by Petitioner at a meeting of the court en banc shortly after Respondent filed this lawsuit and over eighteen months after Respondent was transferred to the permanent position which she still occupies. This remark, directed to the Judge who had hired Respondent, was that 'the lawsuit was all his fault because he had taken Respondent out of the kitchen, taken her apron off and put a robe on her.' The possibility that this remark was made in jest was clear in the evidence at trial.

Even assuming that Respondent desired to remain in the position of hearing officer, hearing only traffic cases for a brief period before being terminated, the evidence does not rise to the level of causation necessary to sustain a jury verdict for punitive damages. In *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 242 (4th Cir. 1982), the Fourth Circuit noted the special problems of proof in discrimination cases. "This emphasis, where causation is dispositive, upon 'probability,' 'reasonable probability,' 'substantial probability,' rather than mere 'possibility' as the proper test simply bespeaks the special danger that in a matter so generally incapable of certain proof jury decisions will be on the basis of sheer speculation, ultimately tipped, in view of the impossibility of choosing rationally between mere 'possiblities' by impermissible but understandable resort to such factors as sympathy and the like. ...[T]he special danger in the causation context invites and justifies the special emphasis."

Respondent's evidence at best presented a possibility that petitioner was biased against women. Petitioner's actions in appointing Respondent to a permanent position, however, contradict that possibility. "Taken altogether . . . claimant's evidence did not suffice to allow a jury to infer that [sex] discrimination was a determining factor in this [transfer]. Though [sex] discrimination is undoubtedly a possibility in any case of this type, and though its easy concealment is a constant danger in attempts to vindicate this statutory right, a jury may nevertheless not be allowed to infer it from evidence that does no more than suggest it as a possibility," *Lovelace* at 245.

This writ should be granted because, as Judge Bowman states in his dissent, "[t]he real issue is not whether Judge Corrigan has or ever had a bias against women. Rather, the issue is whether he made a decision adverse to Goodwin on the basis of her sex. ...[T]he evidence falls woefully short of showing that he did, and accordingly the verdict in Goodwin's favor should not be allowed to stand."

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review of the Judgment and Opinion of the Eighth Circuit.

Respectfully submitted,

PADBERG, McSWEENEY,
SLATER & MERZ
A Professional Corporation

By: Godfrey P. Padberg* #14953
Michael J. Coleman #32506
1015 Locust Street
Suite 800
St. Louis, MO 63101
(314) 621-3787

Attorneys for Petitioner
*Counsel of Record

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 83-1161 to 83-1163

Mary Susan GOODWIN, Appellee,

v.

The CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI, Appellant,

and

William Corrigan,

v.

ST. LOUIS COUNTY, MISSOURI.

Mary Susan GOODWIN, Appellee,

v.

The CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI, and

William M. Corrigan, Appellant,

v.

ST. LOUIS COUNTY, MISSOURI.

Mary Susan GOODWIN, Appellee,

v.

The CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI, and William M. Corrigan, Appellees,

v.

ST. LOUIS COUNTY, MISSOURI, Appellant.

Submitted Nov. 15, 1983.
Decided March 6, 1984.

Before ROSS, ARNOLD and BOWMAN, Circuit Judges.

ARNOLD, Circuit Judge.

Mary Susan Goodwin, a lawyer, claims that she was removed from her position as a hearing officer for the Juvenile Division of the Circuit Court of St. Louis County, Missouri, because of her sex. She brought this action against the Circuit Court and Judge William M. Corrigan, presiding judge of the Juvenile Division, under 42 U.S.C. § 1983 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.[1] A jury awarded plaintiff nominal damages of $1 and punitive damages of $1,000 on her § 1983 claim against Judge Corrigan. The District Court[2] gave plaintiff a declaratory judgment against the Circuit Court on her Title VII claim, holding that she had been discriminated against because of her sex.[3] The District Court also awarded

---

[1] Count I of the complaint, based on Title VII, named both the Circuit Court and Judge Corrigan as defendants. Judge Corrigan's motion to dismiss, on the ground that the plaintiff was employed by the Circuit Court, not by him personally, was granted. *Goodwin v. Missouri,* No. 80-1340 C (2) slip op. 3 (E.D.Mo. Feb. 27, 1981) (Nangle, J.) (Designated Record (D.R.) at 37). The Title VII count went to trial against the Circuit Court only.

Count II of the complaint, based on § 1983, also named both the Circuit Court and Judge Corrigan as defendants. The Circuit Court's motion to dismiss, on the ground that as an arm of the State it is immune under the Eleventh Amendment, was granted. *Goodwin v. Circuit Court of St. Louis County, Missouri,* No. 80-1340 C (2), slip op. pp. 7-8 (E.D.Mo. Dec. 4, 1981) (Nangle, J.) (D.R. at 83-84). The § 1983 count went to trial against Judge Corrigan only.

The two counts were tried at the same time, the Title VII count to the court, and the § 1983 count to a jury.

Plaintiff does not ask us to review the orders of dismissal just described.

[2] The Hon. Clyde S. Cahill, United States District Judge for the Eastern District of Missouri.

[3] No back pay was awarded, because plaintiff was transferred to an attorney position, that paid no less than the salary of hearing officers. Reinstatement was denied because the hearing officer position no longer exists. Plaintiff has not appealed from these rulings.

plaintiff attorneys' fees and costs of $17,972.29, this award being made against the Circuit Court under 42 U.S.C. § 2000e-5(k) and against Judge Corrigan under 42 U.S.C. § 1988. In addition, the Circuit Court was awarded judgment on its third-party claim against St. Louis County, requiring the County to reimburse the Court for whatever the Court had to pay Goodwin.

Judge Corrigan, the Circuit Court, and the County appeal. We affirm the judgment against Judge Corrigan. There was sufficient evidence to take the case to the jury on the issue of sex discrimination under Section 1983. As to the Title VII claim, we hold that the District Court erroneously placed the burden of proof on the Circuit Court. The judgment against the Circuit Court is vacated, and the cause remanded for a new finding to be made under the correct legal standard, which places the burden of persuasion on the issue of discrimination on the plaintiff. The appeal of the third-party defendant St. Louis County will be held in abeyance pending the District Court's new finding on the Title VII claim and our review of that finding. If in the end the Title VII claim is held to be without merit, the third-party action will be moot and fall of its own weight. Judgment against the third-party defendant is based solely on the Title VII judgment against the Circuit Court. Judge Corrigan does not have a judgment over against the County for reimbursement of whatever he must pay out by reason of the Section 1983 claim.

I. The Factual Background.

In November 1971, Judge Robert G. J. Hoester, the Circuit Judge then presiding over the Juvenile Court, hired Goodwin as a hearing officer for the Juvenile Court. She served in this position under four different juvenile judges until March 1979. During this time she heard about 1,000 juvenile status and child neglect cases a year.

In 1979, Judge Corrigan became juvenile judge. He took this job at the urging of several Circuit Judges who felt that he could restore public confidence in the Juvenile Court. Judge Corrigan investigated the situation at the Court and decided to make several changes. One of these changes involved the number of hearing officers. The judge determined that two of the three existing hearing-officer positions could be eliminated, and that the remaining hearing officer would be used to hear juvenile traffic and misdemeanor cases. This remaining position would itself be eliminated if legislation passed removing traffic offenses from Juvenile Court and moving them to adult court. One of the three hearing officers voluntarily stepped down, leaving Goodwin and Craig Donis, who had been a hearing officer for about two years.

On Thursday, March 1, three days before making his decision about whom to retain as a hearing officer, Judge Corrigan stepped into the office of Commissioner Branom at the Juvenile Court and reportedly said, "This court will never run well so long as there are women in charge."[4] Judge Corrigan could not remember making the remark but did not deny that he made it. Branom testified that he laughed at this remark and that Judge Corrigan said it smiling, with "a twinkle in his eye," and made the remark partly to "needle" Branom's secretary, Holly Jaeger, whom the judge had frequently "needled" despite the fact that it upset her. He also testified that in his opinion the expression "women in charge" referred to Corrine Richardson, the director of the legal department. Branom said that shortly before the judge made the remark, he had had a conversation with the judge in which Branom expressed his disapproval of an action that Richardson had taken.

---

[4] Another witness testified that Judge Corrigan said, "This Court won't run smoothly until we get rid of these g____d____ women."

The next day Judge Corrigan called upon a four member committee of Juvenile Court officials to express its preference over who should be retained as a hearing officer and who should be moved into the legal department. Two members voted to retain Donis as a hearing officer (Commissioners Lemay and Branom), and two voted to retain Goodwin (Richardson, director of the legal department, and Ken Hensiek, director of social services and chief juvenile officer). Lemay stated he felt that Donis had a better working knowledge of the law than Goodwin, and Bronom stated that Donis was better at trying cases in the courtroom. Richardson testified that she voted to retain Goodwin as a hearing officer because she had prior experience with Donis in the legal department and would feel "comfortable" if he were reassigned there. Hensiek testified that he voted to retain Goodwin as a hearing officer and move Donis to the legal department because he felt Donis had fairly extensive experience with the legal department and was the better person to assume those responsibilities. At the end of the meeting, the judge told the committee members that this was a difficult decision and that he would think about it over the week end and let them know on Monday.

The judge testified that he decided on Sunday, March 3, to retain Donis as hearing officer and move Goodwin into the legal department. He testified that he based this decision on complaints he had heard about Goodwin, specifically that she handled hearings more like a social worker than a judicial officer and that she was deficient in her knowledge of the rules of evidence. On Monday, March 5, he informed Goodwin of his decision.

In October 1980, Goodwin filed this suit for employment discrimination. Shortly thereafter, the judges of the St. Louis County Circuit Court met to discuss the suit. At this meeting, Judge Corrigan stated to Judge Hoester that the litigation was Judge Hoester's fault, because he "had taken [Goodwin] out of the kitchen, taken her apron off, and put a robe on her." Judge

Corrigan testified that he was joking when he made this remark. Judge Hoester testified that he knew that Judge Corrigan often made such remarks in jest but on this occasion was not sure whether the remark was intended as a joke or not.

II. The Jury Verdict Under 42 U.S.C. § 1983.

Judge Corrigan attacks the jury verdict under § 1983 on the following grounds: (1) the District Court committed reversible error by incorrectly instructing the jury that the burden of persuasion was on the defendant; (2) the District Court erred in not instructing the jury on the defense of good-faith immunity; (3) the claim of sex discrimination is not supported by sufficient evidence; and (4) the award of punitive damages is not supported by sufficient evidence and is contrary to the law.[5]

A. The burden of persuasion.

During the plaintiff's closing argument counsel began to say that the defendant must prove his defense. Counsel for Judge Corrigan objected to this statement as a misstatement of the law. The following dialogue then occurred (Tr. 486-87).

> THE COURT: The complication, of course, is that under the existing law the burden on any defendant only becomes a burden if the fact finder finds that the plaintiff has proven a prima facie case of discrimination and that's always subject—because jurors are not accustomed to handling these kinds of cases but under the law, the plaintiff must first make a prima facie showing. Then if the plaintiff makes that prima facie showing the burden shifts

---

[5] Judge Corrigan also argues that the court erred in submitting the case to the jury because it lacked jurisdiction because of plaintiff's failure to read a stipulation containing jurisdictional facts into the record. This argument is without merit. A stipulation on file with the court is fully adequate to give the court Title VII jurisdiction. Defendant cites no law which even suggests that the stipulation must be read out loud at the trial.

> to the defendant to show that he did not act in a discriminatory way.
>
> MR. PADBERG: Excuse me, Judge. May I make a record on that, please?
>
> THE COURT: All right. I tell you what we might do. Let me—let me do it this way. I'll sustain the objection to the statement made by Mr. Newman here and we will proceed and you will hear the instructions of the Court. Disregard my oral explanations because I think the instructions make clear to you where the burden and the shifting burden is.

Defense counsel then made no further objection.

The order and burdens of proof laid down by the Supreme Court for Title VII cases apply also to cases of race and sex discrimination in employment brought under 42 U.S.C. §§ 1981 and 1983. See, *e.g., Person v. J.S. Alberici Constr. Co.,* 640 F.2d 916, 918 (8th Cir. 1981) (claim of racial discrimination under § 1981). The burden of persuasion remains at all times on the plaintiff. *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 252-56, 101 S.Ct. 1089, 1093-95, 67 L.Ed.2d 207 (1981). The District Court's initial statement to the jury that the defendant might have "to show that he did not act in a discriminatory way" was therefore mistaken. But the Court immediately sustained counsel's objection and instructed the jury to disregard "my oral explanations." Appellant argues that this admonition was insufficient to cure the error because the Court still left the impression that when it instructed the jury formally it would have something to say about a "shifting burden." We disagree. The Court's statement, taken as a whole, directed the jury to govern itself by what it would hear in the instructions that would be given after all closing arguments had concluded. When those instructions were read, no objection was made on

burden-of-proof grounds.[6] We are not persuaded that the District Court's momentary lapse worked any actual prejudice to the defendant.

B. Good-faith immunity under § 1983.

Judge Corrigan argues that he was acting in "good faith" and hence is immune from damages for sex discrimination under the doctrine of "qualified immunity." Alternatively, he argues that the District Court erred in refusing to give an instruction on "good faith" immunity.

We reject this argument and hold that the defense of "good faith" or qualified immunity is not available in this case. By definition, there can be no liability in such an action unless the plaintiff shows that the defendant intentionally discriminated against her because of her sex. *Cf. International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 335 n. 15, 97 S.Ct. 1843, 1854 n.15, 52 L.Ed.2d 396 (1977) (disparate-treatment action under Title VII). If the jury finds that intentional discrimination has occurred, and if, as in this case, the evidence is sufficient to support that finding, "good faith" on the part of the defendant is logically excluded. This result is even more strongly indicated after the Supreme Court's recent reformulation of qualified-immunity doctrine in *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). Under *Harlow,* a qualified-immunity defense is available if the defendant's "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Ibid.* The right to be free of invidious discrimination on the basis of sex certainly is clearly established, and no one who does not know about it can be called "reasonable" in contemplation of law.

---

[6] We have not been supplied with a copy of the instructions as read. But the transcript does show the absence of relevant objections, and we feel sure counsel would have told us if the instructions as given had said anything about "shifting burdens."

In *Rodriguez v. Board of Education of Eastchester Union Free School Dist.*, 620 F.2d 362, 366-67 (2d Cir. 1980), it is said, in the context of an action for deliberate sex discrimination under § 1983, that good faith would be a defense against liability for damages. With all deference to the Second Circuit, we are at a loss to understand such a holding. In our view, the proper rule is stated in *Flores v. Pierce*, 617 F.2d 1386, 1391-92 (9th Cir.), *cert. denied*, 449 U.S. 875, 101 S.Ct. 218, 66 L.Ed.2d 96 (1980), decided, as it happens, five days after *Rodriguez*. The *Flores* Court said, in language we adopt as our own:

> No official can in good faith impose discriminatory burdens on a person or group by reason of a racial or ethnic animus against them. The constitutional right to be free from such invidious discrimination is so well established and so essential to the preservation of our constitutional order that all public officials must be charged with knowledge of it. *Cooper v. Aaron*, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958).

This statement is just as applicable to cases of invidious sex discrimination as it is to cases of racial or ethnic discrimination. It was not error for the District Court to refuse to give an instruction on the defense of good-faith or qualified immunity.

C. Sufficiency of the evidence.

Judge Corrigan argues that substantial evidence does not support the jury's finding that he discriminated against Goodwin on the basis of sex. In reviewing the evidence, we are persuaded that Goodwin did present substantial evidence of discrimination.

As direct evidence of discrimination, she presented evidence of two statements that Judge Corrigan made which can reasonably be interpreted to indicate a bias against women. She also presented evidence that he routinely made such statements. The first statement occurred just three days before Judge Corrigan made his decision to transfer Goodwin to the legal depart-

ment. He said, "This court will never run well so long as there are women in charge."[7] While the judge claims that he made this statement in jest, the jury could well have disbelieved him or have felt that jokes like these indicate a bias against women. At about the time this suit was filed, Judge Corrigan said to Judge Hoester that the litigation was Judge Hoester's fault because he "had taken [Goodwin] out of the kitchen, taken her apron off, and put a robe on her."[8] Whether made in jest or not, this statement reflects certain attitudes of Judge Corrigan toward women which might motivate him to treat them differently. Also, Goodwin produced evidence that Judge Corrigan repeatedly needled Holly Jaeger with sexist remarks that upset her. In addition, Goodwin testified that Judge Corrigan accused her of violating the constitutional rights of juveniles although the judge took no steps to determine the correctness of the information on which he based his accusation. In his own defense, Judge Corrigan did not offer any explanation for his accusation. Further, the judge states that he based his decision to transfer Goodwin on complaints he had received, but again he made no efforts himself to verify their accuracy or investigate the basis of the complaints. The jury may have interpreted this as indicating the predisposition of Judge Corrigan to believe that women were not good judicial officers.

---

[7] Judge Corrigan argues that the District Court erred in admitting this statement because it is not relevant although it is highly prejudicial. The statement is clearly relevant to determining the judge's motives, directly concerning as it does the question of women in the court, and coming just three days prior to the decision to transfer Goodwin. In addition, defendants made no objection when two of Goodwin's witnesses testified about this statement on direct examination.

[8] Judge Corrigan again argues that the prejudicial value of this evidence exceeds its relevance. We find this argument equally unconvincing. The statement, although made after the alleged discriminatory act, may reflect the attitude of the Judge toward women, even if it was made in jest. The jury has the responsibility of determining what weight to give to the statement.

As to evidence of pretext, Goodwin presented some evidence to rebut the defendant's evidence that Donis was better qualified as a hearing officer. Judge Corrigan essentially claimed that Goodwin was inferior in two respect: (1) her legal ability; (2) her conduct in running hearings in the manner of a social worker. As to her legal abilities, the three juvenile judges prior to Judge Corrigan all roundly praised Goodwin's performance, including her legal abilities. Judge Hoester testified that during his term Goodwin "did a fine job." Judge Lasky likewise testified that during his tour in juvenile court from 1974-76, Goodwin was "a good lawyer," and "an excellent hearing officer." His successor, Judge Edwards, testified that he observed Goodwin on numerous occasions, including the trial of cases, and that she was an "excellent hearing officer" and had a "good knowledge of the law." Further. Goodwin had approximately five years more experience as a hearing officer than Donis. While several witnesses stated that they thought Goodwin's legal abilities were lacking, the jury was free to disbelieve them.

Appellant also argues that the attorney position to which he transferred plaintiff was much more desirable than the hearing-officer position she was forced to leave. The hearing-officer position was to be reduced to handling mainly traffic cases and was in any case to be phased out altogether as soon as the Legislature enacted a desired juvenile-court reorganization. The argument essentially is that Judge Corrigan did Goodwin a favor by transferring her into a permanent position as staff attorney, and that she therefore has no cause to complain. The jury, we suppose, might have accepted such an argument, but it was hardly obliged to do so. Goodwin apparently preferred being a judge for a year to being an assistant prosecuting attorney indefinitely. The jury was within its rights in finding that his preference could not be defeated by invidious discrimination.

D. Punitive damages.

Judge Corrigan argues that the award of $1,000 in punitive damages must be set aside because no evidence supports such damages, because such damages cannot be given without a showing of actual damages, and because the amount of punitive damages is excessive in relation to the actual damages.

We hold that there is sufficient evidence to support the jury's award of punitive damages. This Court has stated that "[p]unitive damages may...be awarded in civil rights actions where the defendant exhibits oppression, malice, gross negligence, willful or wanton misconduct, or a reckless disregard for the civil rights of the plaintiff." *Guzman v. Western State Bank of Devils Lake,* 540 F.2d 948, 953 (8th Cir. 1976). In *Smith v. Wade,* ____U.S.____, ____, 103 S.Ct. 1625, 1640, 75 L.Ed.2d 632 (1983), the Supreme Court stated that punitive damages may be obtained under § 1983 when "the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." Here the statements made by Judge Corrigan could support a jury's finding of intentional or reckless indifference to Goodwin's right to be free from sex discrimination. Juries are uniquely suited to make this kind of moral judgment.

As to the claim that punitive damages may not be awarded unless actual damages are proved, this is not the law. See *Merritt v. De Los Santos,* 721 F.2d 598, 601-02 (7th Cir. 1983); *Ryland v. Shapiro,* 708 F.2d 967, 976 (5th Cir. 1983); *Wilson v. Taylor,* 658 F.2d 1021, 1033 (5th Cir. 1981); *cf. Carey v. Piphus,* 435 U.S. 247, 257 n. 11, 266, 98 S.Ct. 1042, 1049 n. 1, 1053, 55 L.Ed.2d 252 (1978) (implies punitive damages may be awarded even if only nominal damages shown). As to the claim that the punitive damages must be set aside because they are excessive in relation to the actual damages, we see no merit to this argument in cases where only nominal damages are given. If the amount of punitive damages must always depend on actual

damages, it would follow that no punitive damages could be given in cases involving only nominal damages. As just noted, this is clearly not the law. Further, we think the jury's award of $1,000 was not unreasonable under the circumstances and will serve to deter future conduct in violation of civil rights.

III. The Title VII Claim.

The Circuit Court appeals the District Court's Title VII order on several grounds: (1) that the plaintiff could not sue under 42 U.S.C. § 2000e because she was an immediate adviser to an elected official; (2) that the District Court erred in shifting the burden of proof to the defendant; and (3) that the Circuit Court has judicial immunity from this suit. We discuss each argument in turn.

A. Classification of Goodwin as an "employee" under 42 U.S.C. § 2000e(f).

Title 42 U.S.C. § 2000e(f) defines "employee" in pertinent part as follows:

> The term "employee" means an individual employed by an employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office.[9]

---

[9] As Judge Van Sickle has remarked, this definition is not an example of outstanding draftsmanship, "being a definition subject to an exception which exception is subject to an exception." *Howard v. Ward County*, 418 F.Supp. 494, 502 (D.N.D. 1976).

The Circuit Court argues that Goodwin was an immediate adviser to an elected official and thus does not qualify to sue under Title VII. We reject this argument. The legislative history of this exemption shows that it is meant to apply to those employees who are in "a close personal relationship" with the official. 118 Cong. Rec. 4492-93 (1972) (remarks of Sen. Williams); *Gearhart v. Oregon,* 410 F.Supp. 597, 600-01 (D.Or.1976); *Marafino v. St. Louis County Circuit Court,* 537 F.Supp. 206, 211 (E.D.Mo. 1982), *aff'd per curiam on other grounds,* 707 F.2d 1005 (8th Cir. 1983). Here the testimony clearly showed that Judge Corrigan and Goodwin had very few personal contacts. Thus the job did not entail the sort of personal relationship contemplated in the exception. The hearing-officer job itself required Goodwin to assert her independent judgment free from any direction from others, including Judge Corrigan. While it can be said that Goodwin offered "advice" to Judge Corrigan in the sense of providing recommendations for the disposition of cases, this "advice" was of a formal, detached nature, from one judicial officer to another. Any doubt that might exist that Goodwin functioned as an "immediate adviser" is resolved by the explicit Congressional intent that "this exemption shall be construed narrowly." Joint Explanatory Statement of Managers at the Conf. on H.R. 1746, 92d Cong., 2d Sess., 1972 U.S. Code Cong. & Ad. News 2179, 2180 (1972).[10]

---

[10] We note also the District Court's holding that "plaintiff was not hired by Judge...Hoester to be on his or any other judge's personal staff but instead was hired as a county employee." *Goodwin v. Circuit Court of St. Louis, Missouri,* No. 80-1330 C (2), slip op. p. 6 (E.D.Mo. Dec. 4, 1981) (Nangle, J.) (D.R. 82). This holding is based on the District Court's understanding of the statutes and judicial practices of its own State. On such questions we normally defer to the decisions of the district courts.

Our holding that Goodwin was not an "immediate adviser" makes it unnecessary to decide the further question whether Missouri Circuit Judges, who are initially appointed by the Governor and are thereafter

B. The burden of proof under Title VII.

The District Court's opinion states:

> After Goodwin's prima facie case is established, the burden shifts to the Circuit Court to show a non-discriminatory purpose for the selection of Donis over Goodwin or that Goodwin was not treated differently from the other persons available for the hearing officer position.

Goodwin v. Circuit Court of St. Louis County, 555 F.Supp. 658, 662 (E.D.Mo. 1982).

This statement of the law is incorrect. In *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), the Supreme Court expressly stated that the only burden that shifts to the employer-defendant in Title VII actions is the burden of production; the burden of persuasion on the issue of discrimination remains on the plaintiff at all times.[11] To correct this error, we remand the

---

retained unless the people at periodic elections vote otherwise, but who do not face named opposing candidates at the polls, are "elected to public office" wihtin the meaning of § 2000e(f). *Compare Goodwin v. Circuit Court of St. Louis County, Missouri, supra,* slip op. p. 6 (D.R. 82) (Nangle, J.) (implying that Circuit Judges are not "elected" for this purpose), *with Marafino v. St. Louis County Circuit court, supra,* 537 F.Supp. at 211 (Filippine, J.) (assuming that Circuit Judges are "elected").

[11] Ordinarily, when § 1983 and Title VII claims are tried jointly, the § 1983 theory to the jury and the Title VII theory to the court, a jury verdict on the issue of discrimination would collaterally estop the parties with respect to that issue on the Title VII claim. See, *e.g., Sisco v. J.S. Alberici Constr. Co.,* 655 F.2d 146, 151 (8th Cir. 1981), *cert. denied,* 455 U.S. 976 (1982). We decline to affirm the Title VII judgment on that basis in the peculiar circumstances of this case. No one has argued this application of estoppel by judgment, either here or below. Counsel for all parties seem to have assumed that the court would make its own finding on the issue of discrimination, whichever way the jury verdict went on the § 1983 case. Therefore counsel for

case to the District Court for certification of what its finding would have been had it properly placed the burden of persuasion on the plaintiff.

C. Judicial immunity of the Circuit Court.

The Circuit Court argues that it is cloaked with judicial immunity because the transfer of Goodwin to the legal department was an act in the official judicial capacity of Judge Corrigan. We disagree. The decision of whom to retain as a hearing officer is not an official judicial act. It is an administrative personnel decision. See *Marafino v. St. Louis County Circuit Court, supra,* 537 F.Supp. at 211.[12]

IV. Conclusion

In summary, we affirm the judgment entered against Judge Corrigan under 42 U.S.C. § 1983. The judgment against the Circuit Court under Title VII is vacated, and the cause is remanded to the District Court with directions to make a new finding on the issue of discrimination *vel non,* this time having clearly in mind that the burden of persuasion on that issue remains at all times on the plaintiff. We ask the District Court to make this new finding as soon as reasonably practicable and to certify it to this Court. In the meantime, we will retain jurisdiction of the appeal in order to review the District Court's new finding, after it is certified to this Court, under the clearly-erroneous rule of Fed.R.Civ.P. 52(a). If this issue is ultimately resolved in the plaintiff's favor, we will then consider the appeal of the third-party defendant St. Louis County from the judg-

---

the Circuit Court felt no real incentive to make independent objections to or requests for jury instructions. Res judicata is not an inflexible dogma. It would be unfair to apply it against the Circuit Court here.

[12] For the same reasons we also reject Judge Corrigan's claim to judicial immunity from suit under § 1983.

ment entered against it on the third-party claim of the Circuit Court. If, on the other hand, the issue of discrimination is ultimately resolved in favor of the defendant Circuit Court, the appeal of the County will be moot.

Affirmed in part, vacated in part, and remanded.

BOWMAN, Circuit Judge, concurring in part and dissenting part.

I agree that the district court erroneously shifted the burden of persuasion in rendering its judgment against the Circuit Court of St. Louis County. To that extent, I concur in our Court's disposition of the Title VII claim. With respect to our Court's affirmance of the judgment entered against Judge Corrigan under 42 U.S.C. § 1983, however, I dissent because I do not view the evidence as being sufficient to support the jury's verdict against Judge Corrigan. The real issue is not whether Judge Corrigan has or ever had a bias against women. Rather, the issue is whether he made a decision adverse to Goodwin on the basis of her sex. In my opinion, the evidence falls woefully short of showing that he did, and accordingly the verdict in Goodwin's favor should not be allowed to stand.

The hearing officer positions, one held by Goodwin and one held by Donis, were to be eliminated. Goodwin has not alleged that the decision to eliminate those positions flowed from improper motives or was in any way unlawful. With that decision already made, Judge Corrigan then had to decide which of the two hearing officers would be kept on for a few months in a temporary hearing officer position and which of them would be transferred without any reduction in pay or benefits, to a permanent position on the legal staff. He consulted with an executive committee of juvenile court officials, one of whom was a woman. Although this committee was unanimous in its view that Donis was the stronger of the two candidates, the members were evenly divided on the question of which candidate should

be assigned to which position.[1] Judge Corrigan's decision to retain Donis in the temporary hearing officer position was in no way inconsistent with the views of the committee.

Judge Corrigan also was aware that the duties of the temporary hearing officer would be restricted mainly to hearing juvenile court traffic cases. He knew that Donis had considerable recent experience with such cases and that Goodwin did not.[2] Beyond that, Judge Corrigan had not received any criticism of Donis's performance, and he knew that Donis's work as a hearing officer was well regarded. On the other hand, Judge Corrigan had received adverse comments regarding Goodwin's performance as a hearing officer. The opinion of the Court misperceives the significance of this criticism of Goodwin's legal abilities when it suggests that the jury was free to disbelieve the witnesses who stated that they thought Goodwin's legal abilities were lacking. The ultimate view of a jury concerning the credibility of Goodwin's critics does not matter, what matters is that Judge Corrigan had such criticism before him, that he did not find it unbelievable, and that it was part of the totality of information on which he based his decision. Furthermore, Judge Corrigan had had the opportunity to review findings of fact, conclusions of law, and recommendations made by Goodwin in numerous cases. He personally had evaluated her work as a hearing officer and had developed misgivings about it.

The only evidence that even remotely could be construed as an indication of unlawful discrimination on the part of Judge

---

[1] The committee members had differing views as to the relative importance of the two positions, not as to the strengths of the two candidates. The two committee members who voted to retain Goodwin as the hearing officer did so because they wanted the stronger candidate, Donis, placed on the permanent legal staff. The two committee members who voted to retain Donis as the hearing officer did so because they believed it was necessary to fill that position with the stronger candidate.

Corrigan consists of two remarks he made.[3] One of the remarks was jokingly made in the context of a discussion concerning a decision made by Corinne Richardson, head of the legal department. The other remark, which occurred during an en banc meeting of the circuit court, was made more than one year after Judge Corrigan transferred Goodwin. Given the context of the first remark and the time frame of the second, the relevancy of this evidence becomes, at best, highly questionable. What we are left with are two highly prejudicial remarks of minimal probative value, evidence of which could well have been excluded by the district court in the exercise of its sound discretion. *See* Fed.R.Evid. 403.

A strained interpretation of this evidence might lead one to infer that Judge Corrigan was, *in general,* biased against women and that he acted upon such a bias. That interpretation is, however, illogical. If in fact Judge Corrigan's decision was motivated by imprmissible bias, one would think that he would have placed Goodwin, rather than Donis, in the temporary position. The action he took was totally inconsistent with such a bias or with a desire to rid the court of women. Quite to the contrary, the record establishes by uncontradicted testimony that Judge Corrigan consistently made fair and unbiased decisions affecting femaly employees of the court, that he hired women for positions with the court, and that on a least one occasion he restructured a position to meet the needs of a female staff member for part-time employment. This is hardly the record of a man driven by a bias against women.

---

[2] While Goodwin had heard traffic cases in her early years of service as a hearing officer, 90 percent of her case docket since 1976 had been abuse and neglect cases.

[3] The text of these remarks is set forth *supra* in section II.C. of the Court's opinion.

Moreover, even if the evidence could be read as indicative of a general bias, it would not prove the specific act of which Goodwin complains. There is a vast difference between a general bias and an act of intentional discrimination. Unless the onset of an Orwellian nightmare is closer at hand than most of us have realized, in our society the law still punishes bad deeds, not bad thoughts or the expression of unfashionable opinions. Expression may color conduct or explain motive, where motive is in question, but expression that at most tends to show a general bias toward a protected group cannot be allowed to serve as a total substitute for direct proof of unlawful discrimination. In this case there is a total absence of such direct proof. What has happened is that Judge Corrigan has been found guilty because of the atmospherics created by his remarks, not because Goodwin properly carried her burden of persuasion on the issue of intentional discrimination.

The result of Judge Corrigan's decision was Goodwin's transfer to a permanent position on the legal staff of the court, at no reduction in pay or benefits. Donis stayed in the one remaining hearing officer position, handling juvenile traffic cases until, as anticipated, the position was phased out approximately a year later. Donis then was out of a job with the court. I have great difficulty in viewing this as a decision adverse to Goodwin. By any objective standard, the decision Judge Corrigan made was favorable to Goodwin. Her claim would be a much more sympathetic and understandable one if in fact she had been retained in the temporary, soon-to-be-phased-out hearing officer position. Indeed, if Judge Corrigan had decided to put Goodwin in the temporary position she now claims to have wanted it is hard to imagine that she would not have attacked *that* decision on grounds of sexual bias. It troubles me deeply that we are sustaining a judgment against Judge Corrigan when it appears likely that either of the actions he could have taken regarding Goodwin's employment status would have subjected him to the same attack, and under the decision of the Court, to the same liability. This strikes me as being manifestly unjust.

In short, Goodwin's evidence cannot reasonably be viewed as sufficient to establish her case. Even under this Court's stringent standards, *see, e.g., Bauer v. Norris,* 713 F.2d 408 (8th Cir. 1983), Judge Corrigan should have been granted a directed verdict or a judgment notwithstanding the verdict.

For the reasons indicated above, I would reverse the § 1983 judgment against Judge Corrigan. Furthermore, because evidence insufficient to support a sex discrimination claim under § 1983 likewise is insufficient to support the same claim under Title VII, the Title VII judgment against the circuit court should be reversed for insufficiency of the evidence as well as on the ground set forth in the opinion of the Court.

APPENDIX B

Mary Susan Goodwin,
Plaintiff,

v.

The Circuit Court of St. Louis County, Missouri, and William M. Corrigan,
Defendants,

v.

St. Louis County, Mo.,
Third-Party Defendant.

No. 80-1340C(5).

United States District Court,
E.D. Missouri, E.D.

Dec. 30, 1982.

MEMORANDUM OPINION

CAHILL, District Judge.

This matter is before the Court for final disposition on the merits of Count I of Mary Susan Goodwin's complaint and for ruling on the merits of the third-party complaint filed by the defendant Circuit Court of St. Louis County (Circuit Court) against St. Louis County, Missouri (the County).

Goodwin initiated this action by filing a two-count complaint alleging that she was "demoted" from her position as a hearing officer for the Juvenile Division of the Circuit Court because she is a woman. Count I alleges that the Circuit Court violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*, and Count II alleges that defendant the Honorable William M. Corrigan individually contravened the Civil Rights Act of 1866, particularly 42 U.S.C. § 1983, by displacing Goodwin from her hearing officer position because of her sex.

Count II was tried to a jury that found for Goodwin and awarded her one dollar as nominal damages and $1,000 punitive damages. Goodwin's Title VII claim was tried to the Court simultaneously with the jury tried § 1983 cause of action. The parties also have presented stipulations of fact and legal memoranda on the Title VII claim for the Court's consideration. Goodwin seeks the following relief under Count I: 1) a finding that the Circuit Court engaged in unlawful employment practices, 2) an order requiring the Circuit Court to reinstate Goodwin to her position as hearing officer, and to compensate her for lost employment opportunities and benefits and for the disadvantages and adverse effects of her alleged demotion, 3) an order enjoining the Circuit Court from engaging in the alleged unlawful employment practices, and 4) reasonable attorney's fees and costs of litigation. The Circuit Court asserts in its third-party complaint that the County is liable for all relief that the Court awards Goodwin under Count I of the complaint. Based on the following findings of fact and conclusions of law, the Court finds for Goodwin on Count I of the complaint and for the Circuit Court on the third-party complaint.

FINDINGS OF FACT

A. Goodwin's Complaint.

1. Mary Susan Goodwin is a female citizen of the United States and a resident of the State of Missouri. At all relevant times herein she was employed by the Circuit Court and paid by St. Louis County, Missouri. Since the adoption of the nonpartisan court selection system for the Circuit Court in August, 1970, the judges of the Circuit Court may retain such office only on approval of a majority of those voting on the proposition at periodic elections. However, the judges initially are appointed by the Governor of Missouri.

2. The Circuit Court is vested with part of the judicial power of the state by Article II, Section 1, and Article V, Sections 1 and 14, of the Missouri Constitution. The Juvenile Court is a

division of the Circuit Court and is responsible for the care, protection, and discipline of children who come within its jurisdiction.

3. The Juvenile Code, Mo.Rev.Stat. Chapter 211, confers broad powers on the Juvenile Court to carry out the statutory purposes of facilitating the care, protection and discipline of children who come within the Court's jurisdiction. Both Chapter 211 and the Rules of Practice and Procedure in Juvenile Court, adopted December, 1975, call for hearings to be held during the various stages of the continuing supervision of the children within the jurisdiction of the Court.

4. Goodwin was hired to work in the Juvenile Court on November 1, 1971. She was selected and sworn in as a Hearing Officer by the then Juvenile Court Judge, Robert Hoester. Judge Hoester was appointed to that position by Missouri Governor Blair in 1958. At all times material herein, the primary function of a hearing officer was to hear cases and make proposed findings and recommendations regarding their disposition to the Juvenile Judge. Goodwin was a hearing officer from November 1, 1971 to March 15, 1979, and during that period she worked for Judges Hoester, Lasky, Edwards, and Corrigan.

5. At all times relevant in this case, the position of hearing officer was not subject to the civil service laws of St. Louis County or the State of Missouri.

6. The position of hearing officer is neither authorized by Missouri statutory law or case law. That position was instituted by the Circuit Court's judges under their inherent administrative powers to efficiently and effectively run the juvenile court system. An executive committee of Circuit Judges (the Committee) oversees the operations of the juvenile court. Traditionally, the presiding juvenile court judge is chairperson of the Committee.

7. At the time Judge Corrigan became the Juvenile Court Judge, January 1, 1979, there were five persons, including himself, who were hearing and adjudicating cases. These included Commissioner Walton LeMay and hearing officers Sam Oliver, Craig Donis, and Goodwin. On March 1, 1979, Robert Branom was appointed by the Circuit Court en banc to become a second commissioner. Juvenile Court Commissioners are authorized by state law.

8. Judge Corrigan declined the position of chairperson of the Committee. However, keeping with tradition, the judges left administration of the juvenile court system to the discretion of the presiding juvenile court judge, Judge Corrigan. Then presiding circuit judge, the Honorable James Ruddy, testified at trial that the circuit judges adhered to a "hands off" policy regarding administration of the juvenile court and left the operation of the juvenile court system to the presiding juvenile judge. But the presiding juvenile court judge usually reported monthly to the Circuit Court en banc and periodically, although less frequently than monthly, to the Committee. Those reports consisted of evaluations of past operations of the juvenile court and proposed actions to improve the juvenile system.

9. After Judge Corrigan became presiding judge of the juvenile court, he undertook to reorganize the juvenile court system by, *inter alia,* eliminating the three positions of hearing officer. Juvenile court officials testified that Judge Corrigan stated that "things aren't going to run smoothly around here until we get rid of these goddamn women." Judge Corrigan initially proposed to phase out the position of hearing officers by first eliminating two of the existing positions and eventually the third one. Although the record is not abundantly clear, several Circuit Court judges testified at trial that Judge Corrigan likely discussed the details of his plan to reorganize the juvenile court system, including Judge Corrigan's choice of person to retain in the remaining hearing officer position, with the Circuit Court en banc.

10. On March 15, 1979, Judge Corrigan transferred Goodwin from the position of hearing officer to a position of staff attorney in the legal department of the juvenile court. Judge Corrigan retained Craig Donis as the sole remaining hearing officer. Donis' employment at the juvenile court terminated in December, 1980. After Donis' termination, the two Commissioners and Judge Corrigan handled the entire caseload and Judge Corrigan handled the entire caseload of the Juvenile Court.

11. Goodwin's salary was not affected by her transfer to the position of staff attorney. The transfer also did not affect other economic benefits of her employment. She receives the same coverage under health insurance and pension plans and she has the same vacation benefits and sick leave. Her work schedule also was unaffected. She has suffered no economic loss as a result of her transfer. However, arguably, the position of hearing officer is more prestigious than that of staff attorney.

12. Goodwin filed a charge of sex discrimination with the Equal Employment Opportunity Commission on July 25, 1979. She filed this suit on October 16, 1981, within ninety (90) days of receipt of a "Notice of Right to Sue" issued by the Commission on August 19, 1980.

13. The Circuit Court met en banc to discuss Goodwin's lawsuit and the course of action to pursue. The Honorable Robert Hoester, who appointed Goodwin to the position of hearing officer, testified that at that meeting Judge Corrigan stated that the Circuit Court would not have had that problem (the lawsuit) if Judge Hoester had not taken Goodwin "out of the kitchen and put her into a robe." All Circuit Court judges that worked directly with Goodwin and observed her performance testified that she was a diligent and competent worker.

14. Several Circuit Court judges at trial testified that no judge inquired specifically about the reasons for Goodwin's transfer or objected to such action. Moreover, no action was taken to investigate the matter after Goodwin formally charged Judge

Corrigan and the Circuit Court with discriminatory employment practices.

B. Third-Party Complaint.

15. Third-Party defendant, St. Louis County, Missouri, is a body corporate and politic, a county of the first class of the State of Missouri, operating under a home rule Charter form of government, adopted on November 6, 1979, pursuant to the provisions of Article VI, Section 18, of the 1945 Constitution of Missouri, and having all the powers and duties prescribed by the Constitution and laws of the State of Missouri and the charter and ordinances of St. Louis County, Missouri.

16. St. Louis County is responsible for the payment of all lawful expenditures of the Circuit Court, including payment of all salaries, compensation and benefits of employment for all personnel (excluding the Judge and Commissioners) of the Juvenile Division of the Circuit Court.

17. Sections 50.640, 50.641 and 476.270, Mo.Rev.Stat., are the pertinent statutory references regarding the budget estimates and expenditures of the Circuit Court and their payment by St. Louis County.

18. The budget estimates of the Circuit Court include the Circuit Court Divisions One through Twenty, Probate Court, Juvenile Court (Children's Building, Juvenile Court Administration, Lakeside Center), Court en Banc, and Associate Circuit Court Divisions Thirty-One through Forty-Three.

19. The procedure followed by the Circuit Court and St. Louis County is that the budget estimate of the Circuit Court is submitted to the County Budget Officer. No later than 60 days prior to the beginning of each fiscal year (currently January 1) the County Executive submits to the County Council a budget for the overall operation of the County. Such budget includes an allocation for the Circuit Court. The budget is adopted by ordinance of the County Council.

20. During the course of a fiscal year, the County Executive may be executive order transfer appropriations within any department. During the course of a fiscal year, supplemental or emergency appropriations are made by the County Council by ordinance, if recommended by the County Executive. These procedures apply to the appropriations for the Circuit Court.

21. Unexpended appropriations are returned to the General Fund at the close of each fiscal year. For each of the fiscal years 1976 through 1981, there were unexpended appropriations of the adjusted appropriation sums provided for the Circuit Court. The unexpended appropriations returned to the General Fund from the Circuit Court for such fiscal years ranged from $462,000 in 1978 to $91,188 in 1980.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over this controversy pursuant to 42 U.S.C. § 2000e5(f) and 28 U.S.C. § 1343.

2. The Circuit Court is a "person" within the meaning of 42 U.S.C. § 2000e(a) and an "employer" within the meaning of 42 U.S.C. § 2000e(b).

3. Goodwin was at the relevant times herein an "employee" within the meaning of 42 U.S.C. § 2000e(f).

4. Goodwin must first establish a prima facie case to succeed on the merits of this Title VII cause of action. *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975); *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Goodwin presented a prima facie case by showing that 1) she is a member of a protected class (female), 2) she ws qualified for the job of hearing officer, 3) despite her qualifications she was transferred from the position of hearing officer, and 4) after Goodwin's transfer, the Circuit Court, through Judge Corrigan, awarded the sole remaining job of hearing officer to a male who has similar or less qualifications. *Meyer v. Missouri State Highway Commission,*

567 F.2d 804 (8th Cir.1977). However, some of the Circuit Court judges testified at trial that Craig Donis was an excellent candidate for the hearing officer position.

5. After Goodwin's prima facie case is established, the burden shifts to the Circuit Court to show a nondiscriminatory purpose for the selection of Donis over Goodwin or that Goodwin was not treated differently from the other persons available for the hearing officer position. *Meyer, supra,* at 807-08. There were three hearing officer positions. Two of them were initially eliminated. The record indicates that Sam Oliver, a former hearing officer, voluntarily relinquished his position. Thus, there were only two persons actually in the running for the remaining position—Goodwin and Donis. The Court finds that the Circuit Court, through Judge Corrigan, treated Goodwin's "application" for the position of hearing officer differently than Donis' because she is a woman, and has failed to rebut the inference that it discriminated against Goodwin on the basis of sex.

6. Having found that the Circuit Court is an employer within the meaning of 42 U.S.C. § 2000e(b), and that the Circuit Court was exercising its inherent administrative power when it transferred Goodwin, the Court concludes that the Circuit Court is not shrouded with judicial immunity in this instance. 42 U.S.C. § 2000e-2(a).

7. The Court finds, however, that Goodwin suffered no economic loss and is not entitled to a monetary award. Goodwin's transfer did not affect her salary or her other economic benefits of employment. She also received the same coverage under her employee health insurance and pension plans. Goodwin also has the same vacation benefits and sick leave as when she was a hearing officer. Goodwin is not entitled to reinstatement because the Court finds that the position of hearing officer has been abolished and the circumstances of this case do not warrant the affirmative relief of ordering that position reopened. *Davis v. Passman,* 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979).

8. The only award to which Goodwin is entitled is declaratory relief. The Court specifically finds that the Circuit Court, through Judge Corrigan, violated Title VII of the Civil Rights Act of 1964 by transferring her from the position of hearing officer to the position of staff attorney because of her sex. Injunctive relief is inappropriate because the Court is not disposed to order the Circuit Court to reinstate Goodwin to the hearing officer position. Since there is no evidence in the record of the Circuit Court's continued discriminatory practice against Goodwin, injunctive relief will be denied.

9. However, the Court does tax Goodwin's attorney's fees and costs of litigation against Judge Corrigan and the Circuit Court. 42 U.S.C. § 2000e-5(k); 42 U.S.C. § 1988.

10. On the third-party complaint, the Court finds that the County is inextricably involved in this litigation inasmuch as it is the funding source of the Circuit Court, *Marafino v. St. Louis County Circuit Court,* No. 78-1255C(3) (E.D.Mo. May 14, 1980), and that without entering judgment against it on the third-party complaint, the Court's broad powers to fashion a remedy to further the objectives of Title VII, 42 U.S.C. § 2000e-5(g), would be a nullity. Moreover, the County admits that it is responsible for the payment of all lawful expenditures of the Circuit Court. One would be hard pressed to deny that a court ruling that assesses a monetary award against the Circuit Court is not a lawful expenditure. Therefore, judgment is entered for the Circuit Court on the third-party complaint that seeks indemnity from the County for any relief awarded to Goodwin against the Circuit Court in this lawsuit.

JUDGMENT AND ORDER

In accordance with the memorandum opinion filed this day and incorporated herein.

IT IS HEREBY ADJUDGED, DECLARED, and DECREED that Mary Susan Goodwin shall have judgment

against the defendant Circuit Court of St. Louis County, Missouri, on Count I of her complaint.

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that third-party plaintiff Circuit Court of St. Louis County, Missouri, shall have judgment against third-party defendant St. Louis County, Missouri, on the third-party complaint.

IT IS HEREBY ORDERED that defendants Circuit Court of St. Louis County, Missouri, and the Honorable William M. Corrigan shall pay Mary Susan Goodwin's reasonable attorney's fees and costs of this litigation.

APPENDIX C

42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1988:

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the Constitution and the statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of Sections 1981, 1982, 1983, 1985 and 1986 of

this Title, Title IX of Public Law 92-318, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the cost.

R.S.Mo. 478.220:

Circuit Judges may hear and determine all cases and matters within the jurisdiction of their Circuit Courts, subject, however, to the following restrictions:

(1) Circuit Judges shall not hear and determine municipal ordinance violation cases, except upon trial de novo, unless the Judge be transferred or assigned to hear and determine the case or that class of case pursuant to Section 478.240 or 478.245, R.S.Mo., or Section 6 of Article V of the Constitution; and

(2) The provisions of this Section authorizing the hearing and determination of particular cases or classes of cases by Circuit Judges shall be subject to the transfer, assignment, and disqualification provisions contained in Article V of the Constitution, in provisions of law, or in Court rules which are authorized by the Constitution or by law.

Office-Supreme Court, U.S.
FILED
JUL 10 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM M. CORRIGAN,
Petitioner,

vs.

MARY SUSAN GOODWIN,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BURTON NEWMAN*
DANIEL P. CARD II
7701 Forsyth, Suite 680
St. Louis, Missouri 63105
(314) 863-4100
Attorneys for Respondent
**Counsel of Record*

LOVE, LACKS, MCMAHON & PAULE
7701 Forsyth, Suite 680
St. Louis, Missouri 63105
(314) 863-4100
Of Counsel

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether a State Trial Judge when acting in his capacity as the Administrator of the Juvenile Court is absolutely or qualifiedly immune from damages, either actual or punitive, or can the Judge be held liable for acts of intentional sexual discrimination against an employee when said Judge acting as the Administrator for her employer transfers a female attorney from her position as a Hearing Officer to the Court to a position of Staff Attorney in the Court's Legal Department.

2. Whether the Court of Appeals erred or so far departed from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision in holding and concluding that Respondent presented sufficient evidence of intentional sexual discrimination against her with respect to employment so as to sustain a jury verdict holding Petitioner liable for punitive damages pursuant to 42 U.S.C. §1983.

PARTIES

The Petitioner herein is the Honorable William M. Corrigan. He was named as a party Defendant to the original proceeding both individually and in his official capacity as the then Judge of the St. Louis County Missouri Juvenile Court.

Respondent herein, Mary Sue Goodwin, an individual, was the Plaintiff in the original proceeding.

There are other parties to this suit who were named as Defendants in the original proceeding. Such parties are: St. Louis County, Missouri, a political subdivision; and the St. Louis County Circuit Court En Banc. The position of these additional parties is adverse to Respondent.

TABLE OF CONTENTS

Page

Statement of the Case:

Nature of the Case, Course of Proceedings and Disposition of Issues Presented by the Courts Below 1

Statement of the Evidence 3

Argument in Opposition to the Granting of the Writ ... 11

I Contrary To Petitioner's Argument, The Opinion By The Circuit Court Of Appeals Does Not Conflict With The Holdings Of Either This Court Or With The Missouri Supreme Court With Respect To Judicial Immunity In That Petitioner In Making The Decision To Transfer Respondent From Her Position As Hearing Officer To A Staff Attorney Was Not Exercising A Judicial Function But Was Rather Exercising An Administrative Function As An Employer. The Doctrine Of Judicial Immunity Applies Not To The Character Of The Actor But To The Nature And Character Of The Act Performed 11

II Certiorari Should Not Be Granted Merely For This Court To Independently Review The Record To Determine And Assess Whether Respondent Presented A Prima Facie Case Of Intentional Sexual Discrimination By Petitioner Pursuant To 42 U.S.C. §1983 So As To Support The Jury's Verdict 21

Conclusion 24

Appendix:

A Order of U.S. District Court A-1

B Portion of trial transcript A-5

TABLE OF AUTHORITIES

Page

Cases:

Bauers v. Heisel, 361 F.2d 581 (3rd Cir. 1966), cert. den'd 386 U.S. 1021, 87 S.Ct. 1367, 18 L.Ed.2d 457 (1967) 13

Doe v. County of Lake, 399 F.Supp. 553 (N.D. Indiana 1975) 13

General Talking Pictures Corp. v. Western Electric, 304 U.S. 175, 82 L.Ed. 1273, 58 S.Ct. 849 (1938), adhered to 305 U.S. 124, 83 L.Ed. 81, 59 S.Ct. 116, Reh. den. 305 U.S. 675, 83 L.Ed. 437, 59 S.Ct. 355 22

Gravel v. United States, 408 U.S. 606, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972) 12

Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) 17, 18, 19, 20

International Brotherhood of Teamsters v. United States, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977) 17

Marafino v. Circuit Court St. Louis County, 537 F.Supp. 206 (E.D. Mo. 1982) aff'd 707 F.2d 1005 (8th Cir. 1983) 13

NLRB v. Pittsburgh SS Co., 340 U.S. 498, 95 L.Ed. 479, 71 S.Ct. 453 (1951) 22

Pierson v. Ray, 435 U.S. 349, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967) 11

Pogue v. Swink, 284 S.W.2d 868 (Mo. Banc 1955) 15, 16

Procunier v. Navarette, 434 U.S. 555, 98 S.Ct. 855, 55 L.Ed.2d 24 (1978) 18

Stump v. Sparkman, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978) 11, 12, 13

Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992, 443 L.Ed.2d 214 (1975) 20

Statutes:

42 U.S.C. §1983 2

42 U.S.C. §2000e 1, 19

No. 83-1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM M. CORRIGAN,
Petitioner,

vs.

MARY SUSAN GOODWIN,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

STATEMENT OF THE CASE

Nature of the Case, Course of Proceedings, and Disposition of Issues Presented by the Courts below

This is a suit for sex discrimination in employment. Respondent, Mary Sue Goodwin, an attorney brought suit in the United States District Court for the Eastern District of Missouri claiming that Petitioner in his capacity as the Administrator of the Juvenile Division of the Circuit Court of St. Louis County, Missouri had removed and transferred her from her position as Hearing Officer to the Court to a Staff Attorney position because of her sex. The Complaint was in two Counts. Count I was instituted pursuant to 42 U.S.C. §2000e *et seq.*, Title VII of

the Civil Rights Act of 1964. Count II was instituted pursuant to 42 U.S.C. §1983. Named as Defendants to both Counts were the Petitioner herein, Judge Corrigan who was the then Administrator and Judge of the Juvenile Division, and the entire Circuit Court, En Banc. The Circuit Court then filed a Third Party Petition naming as a Defendant to Count I, St. Louis County, the entity which paid Respondent's salary. Prior to trial, the District Court dismissed from Count II all Defendants except Judge Corrigan. Such is not an issue.

Trial was had on the two (2) Counts in the Complaint simultaneously. The §1983 Count was tried and submitted to the jury. The Title VII Count was tried and submitted to the Court without a jury. Following its deliberations, the jury returned a verdict on the §1983 Count in favor of Plaintiff-Respondent and against Petitioner. The jury awarded her nominal damages of One Dollar ($1.00) and punitive damages of One Thousand Dollars ($1,000.00). The District Court sitting without a jury then made and entered its Findings of Fact and Conclusions of Law on the Title VII Count. (Pet. A22-A29). The District Court granted Respondent declaratory relief and concluded that the Circuit Court, through Petitioner, had violated Title VII of the Civil Rights Act by transferring her from her position as Hearing Officer to Staff Attorney because of her sex. Injunctive relief was denied. The District Court further awarded Respondent attorney's fees and expenses against both Petitioner and the Circuit Court En Banc. The Court also entered Judgment in favor of the Circuit Court En Banc on its Third Party Petition against St. Louis County, Missouri. (Pet. A21-A31).

Petitioner and the other Defendants then appealed to the United States Court of Appeals for the Eighth Circuit. On March 6, 1984 the Court rendered its Opinion. (Pet. A1-A21). The Court of Appeals affirmed the Judgment against Petitioner on the §1983 Count. (Count II). On the Title VII Count (Count I) the Court vacated the Judgment against the St. Louis County

Circuit Court En Banc and against St. Louis County and remanded with directions to make new Findings on the issue of discrimination *vel non* in light of the Court's Opinion with respect to Respondent's burden of persuasion. The Court of Appeals then specifically retained jurisdiction of the appeal to review the new Findings of Fact from the District Court when received. The District Court has now made and certified to the Court of Appeals its additional and supplemental Findings of Fact and Conclusions of Law again holding in favor of Respondent. Petitioner did not include the same as part of his Petition. A copy is now attached and reproduced by Respondent as part of an Appendix to this Brief. (Appendix, infra, pp. A1-A4). To date, the Court of Appeals has not reviewed or made any determination as to the propriety of the District Court's new Findings of Fact and Conclusions of Law on the Title VII claim (Count I).

With respect to the two (2) issues raised by Petitioner herein, the Court of Appeals first held that he was not entitled to and not cloaked with immunity, either absolute or qualified, when he made the decision as the Administrator of the Juvenile Court to transfer Respondent from her position as a Hearing Officer to the Court's Legal Department as Staff Attorney. The Court of Appeals concluded that Petitioner's actions were not "an official judicial act" but rather constituted "an administrative personnel decision". (Pet. A16). Secondly, the Court of Appeals rejected Petitioner's argument as to sufficiency of the evidence. It concluded that Respondent had presented a *prima facie* case of intentional sexual discrimination by Petitioner so as to sustain the jury verdict against him for nominal damages of One Dollar ($1.00) and punitive damages of One Thousand Dollars ($1,000.00).

Statement of Evidence

Respondent, Mary Sue Goodwin, was first named as a Hearing Officer to the Juvenile Court in 1971 by its then Presiding

Judge, the Honorable Robert Hoester. She continued to serve as a Hearing Officer to the Juvenile Court during the tenure of the three (3) subsequent Juvenile Court Judges until March 1979 when Petitioner removed her from her position as Hearing Officer and transferred her to the Court's Legal Department as Staff Attorney serving a function similar to an Assistant Prosecuting Attorney. (Tr. 126). Petitioner directed Respondent's transfer two (2) months after the Circuit Court, En Banc, had named him as the Juvenile Judge for a term of one to two years.

Judge Hoester testified that, during his tenure as Juvenile Judge, he had had several occasions to observe Respondent's performance and the manner in which she conducted hearings. He testified "she did a fine job". (Tr. 29). The next Juvenile Judge, the Honorable Herbert Lasky who was Juvenile Judge of the Circuit Court from 1974 through 1975 also testified that, during his tenure, he had observed Respondent try cases, had conferred with her, and had reviewed various recommended findings and dispositions. (Tr. 69-70). He described and testified that Respondent was a "good lawyer" and "an excellent Hearing Officer". (Tr. 70). He never had and never heard any complaints about Respondent's performance either from lawyers or from other sources. (Tr. 70). Similarly, the Honorable Ninian Edwards who then served as Juvenile Judge from 1976 through 1978 also testified that he had personally observed Respondent perform her duties as Hearing Officer on numerous occasions. (Tr. 172). He too described Respondent as an "excellent" Hearing Officer who enjoyed a "good knowledge of the law". He further described her as a "rare combination of a good legal person together with a person who was deeply concerned about children". (Tr. 173). Like Judges Lasky and Hoester, Judge Edwards had never received any complaints or negative comments about Respondent's performance either from attorneys or otherwise. (Tr. 173-174).

Petitioner, William M. Corrigan, was then appointed by the Circuit Court, En Banc to be Judge of the Juvenile Division ef-

fective January 1, 1979. He agreed to assume this position as a result of several other Judges of the Circuit Court during the later part of 1978 approaching him and requesting that he take the position in an effort to restore the public's confidence following adverse publicity in the press. He was requested to take this position since he, like Judge Ninian Edwards, was a "strong" Judge. The term of Judge Edward's appointment as Juvenile Judge was expiring and there was a general policy of the Court, En Banc of not reappointing the same Judge beyond a two-three year term. Towards the later part of 1978 there were several articles and investigative stories in a local newspaper containing allegations about a detention worker at the Court molesting female juveniles while being held in detention. (Tr. 351-352). A subsequent investigation by the St. Louis County Grand Jury produced no indictments.

The evidence showed that Petitioner, shortly after assuming the duties of Juvenile Judge, decided to make various changes in the personnel of the Court and to institute changes in procedure as part of a general reorganization. Among the changes which Petitioner decided to make as the Administrator for the Juvenile Division was to decrease and ultimately eliminate if possible the number of Hearing Officers utilized. In this regard he obtained approval from the Court En Banc to fill a vacant position for "Commissioner". He then sought legislation, which if passed, would remove from the jurisdiction of the Juvenile Court authority to hear traffic cases of minors. If passed this would then permit elimination of all Hearing Officer positions. The General Assembly however did not approve such legislation for approximately one (1) year after the events which gave rise to the instant litigation.

At the time of the events in question, the Juvenile Court employed three (3) Hearing Officers. One who was not an actually licensed attorney voluntarily agreed to step down and so advised Petitioner. This left Respondent and one Craig Donis, a male, who had been a Hearing Officer for approximately two

(2) years. Petitioner as part of his reorganization then determined that one of these two remaining positions as Hearing Officer should be eliminated immediately and the individual transferred to the Court's Legal Department as a Staff Attorney to serve a function similar to an Assistant Prosecuting Attorney. Both Respondent and Donis were qualified for the position as Staff Attorney. There was evidence that one Corinne Richardson, who headed the Legal Department, preferred that Craig Donis be transferred to his former position in her department since he had previous experience with her as a trial attorney. (Tr. 304-305).

Respondent adduced evidence to the effect that on Thursday, March 1, 1979, approximately three (3) days before making his decision as to who he would transfer into the Legal Department as a Staff Attorney and who he would retain as a Hearing Officer, that Petitioner walked into the office of Commissioner Branom and stated words to the effect: "this Court won't run smoothly until we get rid of these God-damn women". (Tr. 94). This testimony was confirmed by other witnesses. (Tr. 84, 283). (See Appendix, infra, pp. A6 - A8). Petitioner testified that he could not remember making such remark but he could not deny having done so. (Tr. 424).

Evidence was further adduced that shortly after assuming the position as Juvenile Judge Petitioner had established an "Executive Committee" of sorts to assist him in the general administration and running of the Court. The Juvenile Division employed some two hundred forty-eight (248) persons. (Tr. 382). There was repeated testimony from Petitioner that the Court needed to be run more as a business with a Chief Officer, Division heads and an Advisory Board of Directors. (Tr. 382-385). This Executive Committee conducted Wednesday morning briefings to review various problems and make recommendations to improve the administration of the Court. The evidence further showed that Craig Donis had been invited and attended several of the Wednesday morning briefings. Respondent, on the other hand, was neither invited and never attended.

The evidence further showed, that on Friday the day following Petitioner's remark concerning the employment of women by the Court to Commissioner Branom, this Executive Committee consisting of Commissioner Branom and other department heads met with Petitioner to review and make recommendations between Goodwin and Donis as to who should be transferred to the Legal Department and who should be retained as Hearing Officer. Two individuals recommended to Petitioner that Goodwin be retained as Hearing Officer and two recommended that Donis should be retained. (Tr. 271-272). Petitioner testified he had the ultimate responsibility and the power to veto any recommendations. (Tr. 411). Petitioner then on Monday morning announced a decision to transfer Respondent to the Legal Department and to retain Donis as the Hearing Officer. (Tr. 307). Before announcing his decision, Petitioner, as a courtesy, advised certain other Judges of the Circuit Court of his decision. There was further evidence that Petitioner at or near the time he made his decision to transfer Respondent also made statements to the effect that he considered the Hearing Officer's position to be more important than the position of Staff Attorney. (Tr. 306, 315).

The record evidence showed that Craig Donis had been a Hearing Officer to the Court for only two (2) years. Previous to that he had served as Assistant Supervisor to the Court's Legal Department. Donis had had substantial experience in the prosecutorial job to which Goodwin was transferred. (Tr. 305). Respondent had none. (Tr. 304).

Petitioner explained and testified that he had made the decision to transfer Respondent to the position as Staff Attorney rather than Craig Donis because Craig was the more qualified Hearing Officer and he had received no complaints about his performance while on the other hand he had received complaints about Respondent's ability and whether she was properly preserving the constitutional rights of the juveniles. (Tr. 166-169). Robert Ruhland, who served as an Administrator to

the entire Court En Banc testified that he had received complaints from two to three lawyers, including one Dunley Dunlop, to the effect that Respondent tended to disregard the rules of evidence. (Tr. 229-230). Other than the testimony from Mr. Dunlop to the effect that he felt that Respondent approached her duties more as a social worker than in a judicial manner, Petitioner adduced no other testimony to substantiate the purported complaints he had received from several lawyers as to Respondent's performance. (Tr. 363). Petitioner named several specific attorneys who allegedly voiced complaints to him about Respondent's performance. One of these attorneys was James Hartenbach. (Tr. 435-436). Hartenbach was called as rebuttal witness by Respondent. Hartenbach testified that he had never appeared before Respondent when she served as a Hearing Officer. He further testified that he had never made any statement to Petitioner to the effect that she was not competently performing her duties. (Tr. 455-456). None of the other lawyers who allegedly voiced complaints were called as witnesses.

There was further evidence in the record that before making his decision on transferring Respondent that Petitioner had never observed her performance in the Courtroom. (Tr. 435). Nor had he reviewed her personnel file. (Tr. 440). He had never reviewed or discussed her performance with the previous Juvenile Judges, Judge Hoester, Judge Lasky, or Judge Edwards. (Tr. 31, 72, 178).

Respondent further adduced evidence to the effect that Petitioner had made other provocative remarks about women at the Juvenile Court. Commissioner Branom testified that Petitioner "delighted" in making provocative or what could be described as sexist remarks to Branom's secretary, Holly Jaeger. (Tr. 267). Commissioner Branom described such remarks as "zaps" and indicated that Petitioner would make such provocative remarks at least once a day or at least once every other day. (Tr. 284). Jaeger's reaction to such provocative remarks was to

become visibly upset and to grit and gnash her teeth. (Tr. 269, 284). She did not laugh or consider it humorous and complained to her supervisor, Commissioner Branom. (Tr. 284). Branom in response simply tried to explain that it was Petitioner's manner of being humorous. (Tr. 286). Petitioner also adduced evidence to the effect that he had a "needling" personality and that it was his manner of being humorous. (Tr. 266-267, 424-425). In Petitioner's words "it was in my judgment to help relax people". (Tr. 447).

Respondent adduced evidence to the effect that shortly after the commencement of this suit there was a meeting between the Judges of the Circuit Court, En Banc to discuss the litigation and which attorneys should be hired to represent Petitioner individually and to represent the Court En Banc. During this meeting Judge Hoester testified that Petitioner stated to him that the litigation was all Judge Hoester's fault because he (Hoester) "had taken her [Goodwin] out of the kitchen, taken her apron off and put a robe on her". (Tr. 57, Appendix infra. p. A5). Petitioner testified that when he made such remark he was only joking. (Tr. 432). On the other hand, Judge Hoester testified that although the meetings of the Court En Banc would frequently be marked with good humor he was unaware as to whether Petitioner was "in jest" when he made such statement. He did not know his state of mind. (Tr. 56-57, 59).

Respondent testified that she found her job as Hearing Officer challenging and professionally satisfying. She did not find the position as Staff Attorney to be anywhere near as satisfying or responsible. (Tr. 127). She enjoyed presiding at the hearings, taking testimony, and making recommended findings and decisions. (Tr. 111, 149). Respondent during her tenure as a Hearing Officer to the Court had served as Chairperson to the Missouri Bar Juvenile Law Committee. She was also a member of the National Council of Juvenile and Family Court Judges. (Tr. 107-108). Similarly, Judge Edwards testified that Respon-

dent's position as a Hearing Officer to the Court was one of "great dignity". (Tr. 180). In his opinion the Hearing Officer position was "far more helpful" and desirable careerwise than was the Assistant Prosecuting Attorney position to which she was transferred. (Tr. 193-194). Petitioner expressed contrary testimony to the effect that in his opinion he felt that serving as a trial attorney as an adversary was a far more respected position than a Hearing Officer to the Juvenile Court and would more likely benefit her legal career. (Tr. 421-422).

As noted previously, there was further testimony from Petitioner describing his role and function as a Juvenile Judge to the Court. He drew a distinction between making judicial decisions and serving as an Administrator. He testified that as the Administrator to the Juvenile Court he attempted to place it more on a "corporate structure" and to administer it as if he were "running a business" which had to be responsive and accountable to the public. (Tr. 382-385, 453-454). Petitioner testified and expressed his opinion that it would be inappropriate for he or any other Judge to consult and to obtain input from others in making a quote unquote "judicial decision". Petitioner, however, did not believe that it would be inappropriate for he or another Judge to consult and obtain input from others with respect to the various administrative decisions which had to be made concerning the running and functioning of the Juvenile Court. (Tr. 453-454). He acknowledged that his decision to transfer Respondent was a "personnel action" which was part of the ongoing reorganization, transfer, demotion, and termination of employees. (Tr. 449-450).

ARGUMENT IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI

I

Contrary To Petitioner's Argument, The Opinion By The Circuit Court Of Appeals Does Not Conflict With The Holdings Of Either This Court Or With The Missouri Supreme Court With Respect To Judicial Immunity In That Petitioner In Making The Decision To Transfer Respondent From Her Position As Hearing Officer To A Staff Attorney Was Not Exercising A Judicial Function But Was Rather Exercising An Administrative Function Acting For Her Employer. The Doctrine Of Judicial Immunity Applies Not To The Character Of The Actor But To The Nature And Character Of The Act Performed.

Petitioner contends that this Court should grant the Writ of Certiorari since the decision of the Eighth Circuit Court of Appeals totally conflicts with prior decisions of this Court and abrogates the doctrine of judicial immunity from damages, either absolute or qualified. Not so. The acts in question simply were not judicial acts but rather administrative acts made by Petitioner in his capacity as an employer and supervisor.

Respondent acknowledges that State Court Judges enjoy absolute immunity from liability for damages for judicial acts performed by them. *Pierson v. Ray,* 435 U.S. 349, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967). Such absolute immunity extends even to cases where the Judge is acting in excess of his jurisdiction so long as the act performed is a judicial act. *Stump v. Sparkman,* 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978). Thus, the crucial question to be determined in the instant case is whether Petitioner's actions in transferring Respondent to a position as Staff Attorney from her position as Hearing Officer was a "judicial" or an administrative act even though performed in his official capacity. The Circuit Coiurt of Appeals and the District Court both concluded that Petitioner's actions were not

"judicial" in nature but rather an "administrative personnel decision". (See, Pet. p. A16). Such Finding and Conclusion by the lower Courts is neither clearly erroneous nor contrary to the decisions of this Court.

The doctrine of absolute judicial immunity extends only to judicial acts. This Court both in *Stump v. Sparkman, supra,* and *Gravel v. United States,* 408 U.S. 606, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972) has expressly recognized that it is the character of the act and not the title of the actor which is important in determining the nature and extent of immunity. Thus in *Gravel* this Court stated:

> "But the Clause [Article I, §6] has not been extended beyond the legislative sphere. *That Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature.* Members of Congress are constantly in touch with the Executive branch of the government and with administrative agencies—they may cajole, and exort with respect to administration of a federal statute—but such conduct, though generally done, is not protective legislative activity." (408 U.S. at 625). (Emphasis supplied).

Similarly, this Court by its repeated references in *Stump* to immunity for "judicial acts" also recognized that Judges, like legislators, are from time to time called upon to perform various acts and functions which although official in nature are not "judicial acts". This Court also reversed the Seventh Circuit on the grounds that said Court had adopted "an unduly restrictive view" of the scope of the State Trial Judge's jurisdiction—not on the grounds that Judges are immune from all acts, even non-judicial. Thus, this Court stated in part:

> "The relevant cases demonstrate that the factors determining *whether an act by a Judge is a 'judicial' one relate to the nature of the act itself, i.e., whether it is a function normally performed by a judge, and the expectations of*

> *the parties, i.e., whether they dealt with the judge in his official capacity.* Here both factors indicate that Judge Stump's approval of the sterilization petition was a judicial act....We may infer from the record that it was only because Judge Stump served in that position that Mrs. McFarlin, on the advice of counsel, submitted the petition to him for his approval. *Because Judge Stump performed the type of act normally performed only by judges and* because he did so in his capacity as a Circuit Judge, we find no merit to Respondent's argument that the informality with which he proceeded rendered his action non-judicial and deprived him of his absolute immunity." (435 U.S. at 362). (Emphasis supplied).

Similarly, lower Federal Courts have also recognized that Judges may perform various acts and functions although in their official capacity which are not "judicial acts" entitled to immunity. In *Doe v. County of Lake,* 399 F.Supp. 553, 556 (N.D. Indiana 1975), the Court stated that the doctrine of judicial immunity does not "immunize every State Court Judge in every law suit". See also, *Bauers v. Heisel,* 361 F.2d 581 (3rd Cir. 1966), cert. den'd 386 U.S. 1021, 87 S.Ct. 1367, 18 L.Ed.2d 457 (1967); and *Marajino v. Circuit Court St. Louis County,* 537 F.Supp. 206, 211 (E.D. Mo. 1982), aff'd 707 F.2d 1005 (8th Cir. 1983).

The record clearly reveals that Petitioner's decision in the instant case to transfer Respondent to a position as Staff Attorney to the Court simply was not a judicial act. Petitioner conspicuously ignores and fails to point out to this Court his own testimony in which he so acknowledged. On direct examination he made several references to attempting to establish the Juvenile Court and to run it as a business similar to a corporation with a Board of Directors with himself serving as the Chief Administrative Officer. Then following the conclusion of cross-examination the following question was propounded by Judge Cahill from the bench and Petitioner responded:

"THE COURT: All right.

Judge, I have one area that I would like to clarify. I believe that I know the answer and—but I think for the purpose of making sure the jury understands, would you please explain the role between your judicial functions and your functions as administrator and whether or not the judicial functions that a Judge performs require him to consult with, confer or ask approval of other Judges.

JUDGE CORRIGAN: Well, the judicial function—it would be a violation of our judicial ethics if I conferred with other Judges on how to make a decision. Judicially I think it would be totally inappropriate.

With regard to the Juvenile Court, it is the only Court I know where the Judge carries a full docket of—full judicial responsibility and at the same time carries this tremendous administrative responsibility and as an administrator, of course, I think the Judge can seek the advice of people...." (Tr. 453-454).

The foregoing clearly demonstrates that both Petitioner and the District Court acknowledged and recognized the test enunciated by this Court in *Stump*. Was the act performed a judicial act one normally performed only by Judges. No.

Throughout this country various managers and supervisors of corporations and other businesses when acting as an employer repeatedly must make personnel decsions and determine which employee to transfer and to retain in one position or another. Simply because such act in the instant case was made by a Judge does not *ipso facto* become a judicial act. Petitioner's argument to the contrary simply places form over substance. Petitioner would read *Stump* and the other decisions of this Court to hold that a Judge acting as an employer cannot be held liable for intentional discrimination but that other employers can. The inequality of such contention is self evident.

Petitioner then contends that the Missouri Supreme Court in *Pogue v. Swink*, 284 S.W.2d 868 (Mo. Banc 1955) recognized and held that a decision by a State Circuit Judge as to the tenure and salary to be paid to a Court employee constitutes a "judicial act" and is entitled to immunity. Not so. Respondent respectfully suggests that Petitioner has misread and misapplied the decision by the Missouri Supreme Court. Petitioner's quotation from the Opinion is simply taken out of context.

In *Pogue* a Circuit Judge by Order entered of record modified and increased the salary which was to be paid by St. Francois County to a Deputy Clerk. The Judge then sent a certified copy of the Order to the County Administrative body. Upon a refusal by the County officials to approve or to pay the increase in the Deputy Clerk's salary, the Circuit Judge then had issued and served upon the County officials an Order to Show Cause why they should not be adjudged in Contempt. The Judge then conducted an evidentiary hearing on the Contempt citation and following a continued refusal of the County officials to pay the increase in salary he ordered their confinement. Following their discharge by Order from the Missouri Court of Appeals in St. Louis in Habeas Corpus, the County Administrative officials then filed suit against the Circuit Judge seeking damages against him for "False Imprisonment and Trespass".

The decision by the Supreme Court in *Pogue* dealt with the propriety of the Circuit Court's dismissal with prejudice of this damage petition. In *Pogue*, the Missouri Supreme Court concluded that the Circuit Judge was immune from damages in that his action in both citing the County officials for Contempt and following an evidentiary hearing adjudging them to be in Contempt constituted a judicial act. It was for this judicial act, the Contempt proceeding, upon which the Missouri Supreme Court determined that a Circuit Judge was entitled to immunity. Nowhere did the Missouri Supreme Court hold or determine that the simple act of setting a salary for a Court official constituted a judicial act entitled to immunity in and of itself. Thus, the Missouri Supreme Court stated:

> "It would seem, as a practical matter, that the thing or action that injured the Appellants and of which they really complained is not the Judge's raising the Deputy's salary and ordering it paid but rather his sentencing them to jail for contempt." (L.C. 871).

Petitioner's quotations from *Pogue,* that a Court of general jurisdiction has the inherent authority to appoint attendants and clerks and to set their salaries is simply taken out of context. Such quotation does not support Petitioner's contention that the appointment or removal of such employee constitutes the "exercise of judicial discretion" entitled to judicial immunity. Nowhere, as in *Pogue,* is Respondent contending that Petitioner did not have the inherent authority to reorganize the Juvenile Court. Nowhere as in *Pogue,* is Respondent contending that Petitioner did not have the inherent authority to reduce the number of Hearing Officers or to transfer her. Such is the power vested in a Judge to administer his Court similar to the power a President of a corporation has. The doctrine of inherent authority was simply established to enable a Court to function and to survive even absent statutory authority or appropriation governing the hiring and firing of personnel and setting their salaries.

But a simple exercise of inherent authority to preserve the functioning of a Court does not automatically, however, translate or make an administrative decision implementing such power "judicial" in character. It does not confer absolute or qualified immunity for an intentional act of discrimination simply on the basis of the employee's sex.

To accord Judges absolute immunity for employment decisions made by them but to permit liability against other public officials for their employment decisions would constitute a denial of equal protection. It would place Respondent, as an employee, in a different classification from other public employees. It would permit Judges, but not other employers, to violate employee's civil rights and to intentionally discriminate

against employees on the basis of their race, religion, national origin, and sex with impunity. The facts of this case simply do not merit the exercise of this Court's discretion to grant Certiorari simply to review the record to determine that Petitioner's actions were not judicial in nature but rather as described by the Court of Appeals an "administrative personnel decision".

Alternatively, Petitioner suggests that this Court should grant Certiorari to determine whether the Court of Appeals erred in failing to at least accord him qualified immunity. But under the facts of this case acts of intentional sexual discrimination in employment do not entitle Petitioner to even a qualified or "good faith" immunity. Both the District Court and the Court of Appeals properly so held.

The jury, in order to return its verdict on the 1983 Count against Petitioner, had to find as a fact that he *intentionally* discriminated against Respondent because of her sex. This Court must contrast such finding of intentional discrimination with the standard of disparate impact which governs Title VII proceedings. See, *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 335 N. 15, 97 S.Ct. 1843, 1854 N. 15, 52 L.Ed.2d 396 (1977). Such finding by the jury of an intentional act of discrimination based upon sex *ipso facto* eliminates any argument that Petitioner either objectively or subjectively acted in good faith if a reasonable person knew or should have known that an employment decision constituting an intentional act of sexual discrimination violates a person's basic and unquestioned constitutional and civil right.

Contrary to Petitioner's argument, this Court's decision in *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) supports, and is not contrary to the determination by the Circuit Court that Petitioner is not entitled to a "good faith" or qualified immunity. This Court in *Harlow* simply recognized that qualified or good faith immunity has both "objective" and "subjective" aspects.

To minimize the adverse consequences and the expense of subjecting public officials to damage suits if such public official was entitled to good faith immunity, this Court enunciated procedures to be followed to reduce such adverse consequences. Federal District Courts and Courts of Appeals were empowered to determine through various pre-trial motions, such as Motions for Judgment on the Pleadings and/or Motions for Summary Judgment, to determine the "objective" aspect of whether the public official is entitled to the good faith or qualified immunity. This "objective" test as opposed to the "subjective" inquiry focuses on whether the challenged conduct violates a person's clearly established statutory or constitutional civil rights which a reasonable person knew or should have known were clearly established at the time the action occurred. Thus if at the time the action occurred, the law was not settled or clearly established a public official "could not reasonably be expected to anticipate subsequent legal developments". See, *Harlow, supra,* 457 U.S. at 818, 73 L.Ed.2d at 410. Also see, *Procunier v. Navarette,* 434 U.S. 555, 98 S.Ct. 855, 55 L.Ed.2d 24 (1978). This Court directed that such "objective" determination and threshold immunity question should be determined prior to broad and far reaching discovery taking place. As this Court articulated such procedure would protect the societal interest of having its public officials not subjected to time consuming and vexacious discovery if the constitutional or statutory rights in issue were not clearly and well settled prior to the occurrence of the challenged acts. Likewise it would also serve and protect the public interest of detering unlawful conduct and providing compensation for victims if the constitutional or statutory rights were clearly settled and established law prior to the occurrence of the challenged acts.

On the other hand, however, this Court also recognized in *Harlow, supra,* that the "subjective" aspect in determining whether a qualified or "good faith" immunity is applicable frequently cannot be resolved by pre-trial motions for summary judgment. See, Footnotes #26 and #27.

The record clearly reveals that both the District Court and the Court of Appeals in the instant case applied the two-pronged analysis enunciated by this Court in *Harlow*. First, in considering and applying the objective aspect of "good faith" or qualified immunity, there can be no question but that Respondent's civil rights as an employee to be free from sexual discrimination by her employer was well settled both statutorily and constitutionally prior to the occurrence of the events in question. Congress in 1964 enacted Title VII of the Civil Rights Act, 42 U.S.C. §2000e *et seq.* which expressly prohibited an employer from discriminating against an employee on the terms and conditions of employment on the basis of among others - sex. No reasonable man therefore, much less a State Judge sworn to uphold both the constitution and laws of the United States, can have had any doubt that sexual discrimination with respect to employment was a prohibited act. But the subjective aspect of whether Petitioner was acting in good faith could not be determined prior to trial since it involved resolution of "factual questions" including a determination as to his state of mind. Petitioner challenged the reliance by District Court and the Court of Appeals on the jury's resolution of this factual question as vesting in a jury the power to determine both the sufficiency of the evidence and whether a good faith defense is appropriate. Such contention and argument simply is without merit.

As Petitioner correctly noted it is a question of law whether a Plaintiff presented a *prima facie* case and whether a good faith defense is appropriate. Similarly, under out system of justice it is the prerogative of a jury, not a Court once the sufficiency of the evidence has been determined to adjudicate and resolve disputed "factual questions". Such power in fact is expressly guaranteed and reserved by the Seventh Amendment to the United States Constitution. The District Court and the Court of Appeals retained at all times the jurisdiction and the right to determine the legal issues of whether Plaintiff presented a *prima facie* case of discrimination and whether Defendant, as a matter

of law, proceeded with the requisite good faith. Such determinations can be made by the District Court upon motion at the close of Plaintiff's case, at the close of all evidence, and again by Motion for Judgment Notwithstanding the Verdict. Once such legal issues have been resolved, however, it is for the jury, not the Court to determine the disputed factual issues of whether Petitioner intentionally discriminated against Respondent because of her sex.

Thus, it was for the District Court and the Court of Appeals on review to determine whether as a matter of law Plaintiff presented sufficient evidence of intentional sexual discrimination so as to permit the factual issues to go to the jury. It was thus for the jury to determine the facts and to believe or disbelieve Petitioner's contentions throughout trial that his remarks and comments about "God-damn women" and removing the "apron strings" from women were made in jest as he contended or were evidence as Respondent contended of a subjective bias and intent to discriminate against women in holding positions of employment with the Court. As this Court noted in *Harlow,* citing from *Wood v. Strickland,* 420 U.S. 308, 95 S.Ct. 992, 443 L.Ed.2d 214 (1975):

> "...qualified immunity would be defeated if an official '*knew or reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights of the Plaintiff, or if he took the action *with the malicious intention* to cause a depravation of constitutional rights or other injury...." (Court's emphasis).
>
> (420 U.S. at 322).

Here the District Court followed the two-prong inquiry of *Harlow.* It determined prior to trial that the "objective" aspect of immunity was not present. The Court could not resolve by summary judgment the "subjective" aspects of immunity and submitted, once a *prima facie* case was made the disputed fac-

tual issues of intent to the jury. This procedure served and balanced the conflicting and competing societal interests recognized in *Harlow*.

Given the limited resources of this Court and in accordance with Rule 17 of this Court this case simply does not present either the factual or legal circumstances so as to necessitate the exercise of this Court's supervisory jurisdiction for it to independently sift through and review the record. Both the lower Courts who are more familiar with the entire record have already made the determination that in this case Petitioner, as a matter of law, did not have the requisite "good faith". The Court of Appeals applied the correct standard with respect to Petitioner's alternative claim to a qualified innumity. Certiorari should be denied.

II

Certiorari Should Not Be Granted Merely For This Court To Independently Review The Record To Determine And Assess Whether Respondent Presented A Prima Facie Case Of Intentional Sexual Discrimination By Petitioner Pursuant To 42 U.S.C. §1983 So As To Support The Jury's Verdict.

In Point II of his Petition, Petitioner respectfully suggests that Certiorari should be granted so that this Court may independently sift through and review the record to determine whether Respondent submitted sufficient evidence as a matter of law. Such issue, however, has already been passed upon by both the District Court and by the Court of Appeals who are thoroughly conversant with the record established. The District Court also had the opportunity in assessing the sufficiency of the evidence to observe the credibility and demeanor of the witnesses. This case simply does not present the requisite circumstances so as to require an exercise by this Court of its power of supervision.

Rule 17 of this Court sets forth certain criteria generally followed in determining whether or not Certiorari should be granted. It clearly is not a matter of right. As noted previously, this Court does not grant Certiorari merely to review evidence or inferences drawn from it. *General Talking Pictures Corp. v. Western Electric.* 304 U.S. 175, 82 L.Ed. 1273, 58 S.Ct. 849 (1938), adhered to 305 U.S. 124, 83 L.Ed. 81, 59 S.Ct. 116, Reh den'd 305 U.S. 675, 83 L.Ed. 437, 59 S.Ct. 355; and *NLRB v. Pittsburgh SS Co.,* 340 U.S. 498, 95 L.Ed. 479, 71 S.Ct. 453 (1951). Rule 17 is not couched or phrased in terms of reviewing a record to determine whether a lower Court erred in its determination of the factual issues or the sufficiency of the evidence. Rather, it is couched and phrased in terms of the decision of the Court of Appeals being in conflict with another decision of the Court of Appeals departing from accepted and usual course of judicial proceedings or sanctioning such a departure by a lower Court so as to require an exercise of this Court's supervisory power.

Petitioner's statement of the case and facts as set out in his Brief is woefully inadequate to describe the evidence presented and the legitimate inferences therefrom could be drawn by both the jury and by the Court. On page 9 of his Petition, Petitioner seeks to minimize and negate the two (2) sexist and extremely disparaging remarks which he made concerning women. One remark was made within three days preceding his decision. The second remark was made during the course of a meeting by the Court En Banc to discuss the instant litigation. Petitioner informed and told another Judge that it was all his fault because he removed Respondent from the kitchen, removed her apron strings and put robes on her. Peitioner would lead this Court to believe that such comments were simply made in jest and were part of his humor and that the evidence in this regard is uncontested. Not so. Petitioner could not even recall making the first remark but did not deny doing so. (Tr. 424). If intended in jest, it was not so interpreted by the recipient to whom it was directed and jesting with Holly Jaeger. She on the other hand

was described during the trial as gritting her teeth and restraining herself. Commissioner Bramon acknowledged that she was extremely upset. When she complained to him he simply counseled her that it was Petitioner's mannerism.

This case presented the classic jury issue. It was for the jury to decide the demeanor and credibility of the witness. It was for the jury to determine whether Petitioner was in fact jesting or whether Petitioner harbored a bias and discriminated against women. The jury was free to disregard and to disbelieve Petitioner's explanations during trial. Petitioner had already acknowledged that he had not consulted with the three (3) Judges who had been Respondent's supervisors immediately preceding. Petitioner had not personally observed Respondent's performance. Petitioner had not reviewed Respondent's personnel file. With regard to the purported complaints he had received from attorneys. One attorney specifically named as complaining denied ever making such a remark. He testified in fact that he had never tried or presented a case in front of Respondent as Hearing Officer.

In short, this case simply does not present the requisite important public issue as distinguished from the party so as to necessitate review by this Court.

CONCLUSION

Petitioner obviously is dissatisfied with the jury's verdict and the Opinion from the Court of Appeals holding that he was neither entitled to absolute immunity or qualified immunity for his decision to transfer and demote Respondent from a Hearing Officer position to a Staff Attorney position. But as shown, the Court of Appeals decision does not conflict with prior holdings relative to judicial immunity. Nor does this case present the requisite public importance so as to necessitate an independent review and sifting by this Court of the record to determine whether sufficient evidence of intentional sexual discrimination was presented as a matter of law. Such review has already been conducted by two (2) lower Federal Courts and have been ruled adversely to Petitioner. Certiorari should accordingly be denied.

Respectfully submitted,

Burton Newman*
Daniel P. Card II
7701 Forsyth, Suite 680
St. Louis, Missouri 63105
(314) 863-4100

Attorneys for Respondent

*Counsel of Record

OF COUNSEL:

LOVE, LACKS, McMAHON & PAULE
7701 Forsyth, Suite 680
St. Louis, Missouri 63105
(314) 863-4100

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 80-1340-C (4)

Mary Susan Goodwin,
Plaintiff,

v.

The Circuit Court of St. Louis County,
and William M. Corrigan,
Defendants.

ORDER

(Filed May 22, 1984)

This matter is before the Court on remand from the Eighth Circuit. In accordance with the Eighth Circuit opinion, this Court hereby enters its supplementary findings of fact and conclusions of law.

Supplementary Findings of Fact

1. Judge Corrigan's stated reason for transferring plaintiff Goodwin was because she was the weaker of the two hearing officers. Tr. at 416. Corrigan claimed Goodwin was inferior for two reasons: (1) Her legal ability, and (2) her conducting hearings in the manner of a social worker. Tr. at 414-16.

2. The three juvenile judges preceding defendant Corrigan all praised Goodwin's performance and legal ability. Judge Hoester "thought she did a very fine job." Tr. at 29. Judge Lasky stated she was "a good lawyer" and "an excellent hearing officer." Tr. at 70. He stated he had received no com-

plaints about Goodwin. Tr. at 70. Judge Edwards stated she was "excellent" and had a "good knowledge of law." Tr. at 173. He also stated that he had received no complaints about Goodwin. Tr. at 174.

3. Judge Corrigan received complaints about Goodwin and apparently made no effort to investigate these complaints. Tr. at 414-16, 435-36, 440, 448, 450-51.

4. On Thursday, March 1, 1979, in the presence of Gary Guleff, James Bilhorn, Robert Branom, and Carol (Holly) Jaeger, Judge Corrigan made a statement to the effect that things were not going to run smoothly until the court got rid of all the damned women. Tr. at 84, 94, 269. Ms. Jaeger was apparently upset by this remark. Tr. at 269. Judge Corrigan routinely made such allegedly humorous, sexist remarks to Miss Jaeger. Tr. at 284-86.

5. On Monday, March 5, 1979, Judge Corrigan informed Miss Goodwin of her transfer to the Legal Department. Tr. at 123-125.

Supplementary Conclusions of Law

By judgment and order of December 30, 1982, this Court held that the transfer of Mary Susan Goodwin by the Circuit Court acting through Judge Corrigan, violated Title VII of the Civil Rights Act of 1964. *Goodwin v. Circuit Court of St. Louis County,* 555 F. Supp. 658 (E.D.Mo. 1982). This Court's opinion stated:

> After Goodwin's prima facie case is established, the burden shifts to the Circuit Court to show a non-discriminatory purpose for the selection of Donis over Goodwin or that Goodwin was not treated differently from the other persons available for the hearing officer position.

555 F. Supp. at 662. The Court inadvertently failed to state that it is the burden of production that shifts to the defendant after the plaintiff has made a prima facie case.

1. As the Eighth Circuit points out, the Court must apply a three-part analysis in assessing the evidence in a Title VII action. After the plaintiff has established a prima facie case by the preponderance of the evidence, the burden of production shifts to the defendant to articulate some legitimate, non-discriminatory reason for its act. *See Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reason, but were a pretext for discrimination. *Id.* Although the burden of production shifts after the plaintiff has made a prima facie case, the burden of persuasion on the issue of discrimination remains on the plaintiff at all times.

2. Judge Corrigan articulated a legitimate, non-discriminatory reason for his action. He stated that he made the decision to transfer Goodwin based on complaints he received about her. Further, Judge Corrigan claimed Goodwin's legal ability was inferior and that she conducted hearings in the manner of a social worker.

3. Goodwin, however, showed by a preponderance of the evidence that these reasons were pretextual. The evidence shows Judge Corrigan made no effort to investigate the complaints that he claims led to Goodwin's being transferred. This lack of investigation tends to show a bias against Goodwin resulting in Judge Corrigan's accepting without verification the complaints made. Also, contrary to Judge Corrigan's evaluation, the three prior juvenile judges praised Goodwin's performance and legal abilities. Finally, Judge Corrigan made two sexually derogatory statements regarding women in the courts and made repeated sexist remarks to Holly Jaeger.

Accordingly, this Court, using the three-step allocation of burdens and order of presentation of proof required by *Texas Dept. of Community Affairs v. Burdine,* finds that a discriminatory reason played an impermissible role in the decision to transfer Goodwin.

SO ORDERED.

Dated this 22nd day of May, 1984.

/s/ Clyde S. Cahill
United States District Judge

APPENDIX B

Portions of trial transcript

Hoester-Direct

[57]the east end of the table so it was down to the right of the door as you come in.

Q. And

A. Judge Corrigan was across the table from me.

Q. And the topic of discussion was the suit that Sue Goodwin had filed?

A. Yes.

Q. Can you tell the jury what Judge Corrigan said to you about that suit?

A. He said it was all my fault, that I had taken her out of the kitchen, taken her apron off and put a robe on her.

MR. NEWMAN: I have nothing further.

CROSS EXAMINATION

BY MR. PADBERG:

Q. Judge Hoester, how long have you known Judge Corrigan?

A. Well, I guess fifteen, twenty years.

Q. Okay. And would you describe his sense of humor as a needler or wry or for instance when he sees me he tells me

A. I think he has a good sense of humor. There isn't any question about it.

Q. He's always needling someone or another; isn't he?

A. That's true.

Q. As a matter of fact in a Court en banc meeting he's not the only one, there's a lot of judges who banter back and forth with humor; isn't that so?

* * * * *

Bilhorn-Direct

[84] A. I believe so.

Q. Prior to — prior to telling us what Judge Corrigan said at that time, can you describe him as he walked into the area where he worked?

Anything about his gestures, his mannerisms?

A. He walked in fairly rapidly past me and stopped in the doorway to Mr. Branom's office with his hand on the doorknob, the door was standing open—

Q. He was laying on the doorknob?

A. I don't know that he was placing any weight on it.

Q. Holding—

A. He had his hand on the doorknob.

Q. Did you notice any gestures of his head or the other arm?

A. Not prior to any remark he made.

Q. What was the remark — the first remark that he made?

A. As nearly as I can recall he said, "this Court will never run well so long as there are women in charge."

Q. After that statement was made, what did you do?

A. Nearly as I can recall I left the office and went back to my own office.

Q. You said anything?

A. No, sir.

Q. At a later time did you discuss that statement with Sue Goodwin?

* * * * *

Guleff-Direct

[94] Q. And at about that time Judge Corrigan approached that area, did he not?

A. Yes.

Q. Can you describe — describe how he approached the room, the doorway.

A. Well, Judge Corrigan walked into the doorway, grabbed ahold of the doorknob, bowed his head, shaking it from side to side and —

Q. And he was shaking his head from side to side. Did he then look up?

A. I believe he did, yes.

Q. Was he looking toward the area where you were in the office?

A. Yes, he was.

Q. And what did he say?

A. "This Court won't run smoothly until we get rid of these God-damn women."

Q. And what did you say?

A. Nothing.

Q. Did anyone speak after that statement was made?

A. Oh, I'm sure someone did, yes.

Q. Do you recall what was said?

A. No, I don't.

Q. The Monday following that statement Sue Goodwin was transferred to the legal department. Did you later find that . . .

* * * * *

Branom-Cross

[283] used as — for a frame of reference?

A. Not to my recollection.

Q. Did you say that on the date that Judge Corrigan made the statement about women, damn women — is that how you related it? Damn women, not God-damned, but damn?

A. I don't think he said "God", no.

Q. On that date where was Holly Jaeger?

A. Seated at her desk.

Q. She was seated at her desk. How far —

A. Yes, sir.

Q. How far was that from where you were seated?

A. I was standing.

Q. Where were you standing?

A. Behind and to one side of her.

Q. So —

A. To her left.

Q. So you were not in your office?

A. No.

Q. Mr. Guleff was standing where?

A. In the doorway between my offices and Holly's office.

Q. And where was Mr. Bilhorn standing?

A. To the right — to my right of the doorway from Mrs. Jaeger's office to the hallway.

Q. What was the distance between them — all of you from the furthest person to the last person?

* * * * *